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No. 73 - 920

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

LLOYD GEORGE KERNS, *Petitioner,*

v.

SAMUEL J. JORDON, MAHONING COUNTY BOARD OF ELECTIONS, JOHN J. GILLIGAN, Governor of the State of Ohio, JOSEPH T. FERGUSON, Auditor of the State of Ohio, TED W. BROWN, Secretary of State of the State of Ohio, ANTHONY O. CALABRESE, SR., Member, Ohio Senate, and ROBERT A. MANNING, Member, Ohio House of Representatives,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Section 11 3
Section 13 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.———

LLOYD GEORGE KERNS, *Petitioner,*

v.

SAMUEL J. JORDON, MAHONING COUNTY BOARD OF ELECTIONS, JOHN J. GILLIGAN, Governor of the State of Ohio, JOSEPH T. FERGUSON, Auditor of the State of Ohio, TED W. BROWN, Secretary of State of the State of Ohio, ANTHONY O. CALABRESE, SR., Member, Ohio Senate, and ROBERT A. MANNING, Member, Ohio House of Representatives,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit entered on November 9, 1973, which dismissed petitioner's appeal from a Memorandum Opinion and Order of the United States District Court for the Northern District of Ohio, Eastern Division, entered June 11, 1973.

OPINIONS BELOW

Neither the order of the United States Court of Appeals for the Sixth Circuit nor the Memorandum Opinion and Order of the United States District Court for the Northern District of Ohio are reported. Both are reprinted in the appendix to this petition at pages 1a and 2a, respectively.

JURISDICTION

The order of the court of appeals was entered on November 9, 1973. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether, consistent with the First Amendment, the federal Anti-Injunction Statute, and settled principles of federalism and comity, a federal district judge can forever enjoin a state supreme court from adjudicating state constitutional challenges to a state legislative reapportionment plan, when those challenges have not been, and will not be, adjudicated by any other court?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT I

"Congress shall make no law . . . abridging the freedom of speech, or . . . the right of the people . . . to petition the Government for a redress of grievances."

STATUTES INVOLVED

The Anti-Injunction Statute, 28 U.S.C. §2283:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

STATEMENT OF THE CASE

This petition arises out of an order of the United States District Court for the Northern District of Ohio, Eastern Division (Battisti, J.), which permanently enjoins petitioner and all other Ohio voters from litigating in any court the validity under the Ohio Constitution of the 1971 Ohio state legislative reapportionment plan. This extraordinary order, which has prevented petitioner from continuing litigation that he brought in the Ohio Supreme Court to review the Ohio constitutionality of the 1971 reapportionment plan, arose out of the following circumstances:

On March 30, 1973, petitioner filed an action in the Ohio Supreme Court styled *Kerns* v. *Gilligan, et al.*, (Case No. 73-270), which alleged that the 1971 reapportionment plan violated the Ohio Constitution in numerous, material respects.[1] The action was filed pursuant to Article XI of the Ohio Constitution, Section 13, which grants the Ohio Supreme Court "exclusive, original jurisdiction" of an action challenging the state constitutionality of a legislative reapportionment plan.

[1] The principal state constitutional claims that were made in the *Kerns* complaint were (1) the plan uses precincts instead of political subdivisions and city wards in creating many legislative districts, contrary to Article XI, §§ 6, 7(B) of the Ohio Constitution; (2) the plan violates the constitutional requirement in Article XI, § 7(A) of compactness of legislative districts for numerous house and senate districts; (3) the plan fails in several instances to place the excess population above the number of whole districts within a county in one adjoining district, contrary to Article XI, § 8; (4) the plan radically changes the previous boundaries of legislative districts, contrary to Article XI, § 7(D); (5) the plan fails to create whole districts within a county in numerous instances, contrary to Article XI, §§ 8, 11.

Shortly thereafter respondents obtained an *ex parte* temporary restraining order from District Judge Frank J. Battisti which specifically ordered petitioner to "withdraw, dismiss and terminate" his action. (App. 11a). In compliance with this order, petitioner dismissed his action in the Ohio Supreme Court.

Thereafter, on June 11, 1973, the temporary restraining order was made permanent by Judge Battisti's Memorandum Opinion and Order, which forever restrains petitioner and all other Ohio voters from attempting to litigate any issue concerning the validity of the 1971 reapportionment plan or, indeed, from undertaking any legal action which would have the effect of impeding any election that might be held under that plan, whether or not such action were concerned with reapportionment issues.[2]

---

[2] The pertinent part of Judge Battisti's injunction provides:

> [A]ll parties to, and class members in, Civil Action No. C71-1130 are hereby permanently restrained and enjoined from litigating any matters which were, or could have been, raised in Civil Action No. C71-1130, in any state or federal court . . . and further that all such persons are permanently restrained and enjoined from filing any new actions affecting any matters which were, or could have been, raised herein and otherwise from taking any actions designed to or which will have the effect of interfering with the carrying out of the orders of this Court; and all such persons are permanently restrained and enjoined from taking any legal action . . . designed to or which will have the effect of impeding or interfering with the carrying out of any election pursuant to the plan of apportionment approved and adopted by the orders of this Court entered December 22, 1971, and March 13, 1972. Furthermore, the defendant Ted W. Brown, as Secretary of State . . . [is] hereby ordered and directed to accept filings and conduct elections only in accordance with the provisions of the March 13, 1972 order of this Court adopting a legislative plan of apportionment so long as it remains in effect, or in conformity with the election statutes of the State of Ohio which are not inconsistent therewith. (App. 8a-9a).

This broad injunction was justified by the district court solely on the ground that it was necessary to protect the judgment of a three-judge district court previously rendered in *Jordon* v. *Mahoning County Board of Elections, et al.,* Northern District of Ohio, Eastern Division (Case No. C71-1130). (App. 13a). That case was filed on November 15, 1971, as a class action on behalf of all qualified voters in Ohio and challenged the validity of the 1971 reapportionment plan on federal and state constitutional grounds.[3]

On December 3, 1971, after counsel for both plaintiff and defendants in the *Jordon* case stipulated that the reapportionment plan was obviously deficient because of its exclusion of certain geographic areas of the state from any legislative representation, the three-judge court ordered that the plan be resubmitted to the apportioning persons in Ohio[4] for the adoption of a "constitutionally sound" plan. At the same time the court enjoined all members of the class (defined as "all registered voters in Ohio") from "litigating any issues raised [by the complaint] in any other court during the pendency of [the] action."

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[3] The *Jordon* complaint challenged the reapportionment plan on four general grounds (1) failure to comply with the one-man, one-vote standard as required by judicial construction of the Fourteenth Amendment to the United States Constitution; (2) failure to comply in numerous, material respects with the express provisions of Article XI of the Ohio Constitution; (3) failure to include certain geographic areas of Ohio in the plan; and (4) gerrymandering along racial and ethnic lines in violation of the Fourteenth and Fifteenth Amendments of the United States Constitution.

[4] The persons responsible for legislative reapportionment in Ohio are designated in Article XI, Section 1, of the Ohio Constitution.

Pursuant to the order of the three-judge court, the apportioning persons reconvened on December 20, 1971, and adopted by a three-to-two vote an amended version of the original reapportionment plan, which did nothing more than incorporate the geographic areas that had been omitted from the original plan. No attempt was made to correct the many other infirmities under the Ohio Constitution which were, and still are, inherent in the plan.

On December 22, 1971, a hearing was held before the three-judge court on the amended reapportionment plan. In the course of that hearing, all three judges on the panel made it clear that the court was going to consider and rule upon only the federal constitutionality of the plan under the one-man, one-vote standard. For example, in a dialogue with one of the attorneys for the plaintiff, Judge Celebrezze, the senior and presiding judge, stated:

> MR. JONES:
>
> . . .
>
> We do continue to have questions about the gerrymandering allegations, both political and racial, and the allegations of lack of compactness.
>
> JUDGE CELEBREZZE:
>
> Is that question proper before this Court? Isn't the function of this Court in this particular litigation to determine whether or not the one-man, one-vote rule has been followed?
>
> MR. JONES:
>
> Well, these all are related, your Honor. The matter of compactness, the matter of the districts being contiguous, these are all elements of the constitutionality of the plan.

JUDGE CELEBREZZE:

There may be a discrepancy between the Constitution of Ohio and the Federal Constitution. The Federal Constitution merely imposes on this Court the duty to determine whether or not the one-man, one-vote rule under Sims v. Reynolds has been complied with. That is the question. (Transcript of Proceedings, pp. 56-57) (Emphasis added).[5]

The court's Memorandum Opinion and Order entered on December 22, 1971, immediately after the conclusion of the three-judge court hearing, confirms the intention of that court not to pass on the claims that the plan was unconstitutional under the Ohio Constitution:

> On consideration of the evidence thus far in the case, the Court concludes that the Board of Apportionment, using the best available 1970 official census or census related data, has made a good faith effort to apply the one-man, one-vote doctrine in devising a plan for redistricting the General Assembly of the State of Ohio, and that the plan as presented to the Court on December 21,

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[5] In addition to Judge Celebrezze's remarks, Judge Walinski made it clear that the state constitutional claims in the *Jordon* case could be raised in a state court:

> JUDGE WALINSKI: This case was filed in the Federal Court out of Mahoning County. Is there any reason that you feel that you could not get adequate remedy from the State Courts on the question of gerrymandering or racial imbalance, and so on? (Transcript of Proceedings, p. 60).

Judge Battisti concurred in this view:

> JUDGE BATTISTI: Well, of course, if you have got a constitutional question that hasn't been resolved before us, you may take it to the Supreme Court; we are not going to entertain it again . . . . (Transcript of Proceedings, p. 66).

1971, insofar as practicable, meets the one-man, one-vote standard required by the Constitution of the United States.

Therefore, it is concluded that the plan as presented to this Court meets the one-man, one-vote standard required by the Constitution of the United States.... (App. 14a) (Emphasis added).

On March 13, 1972, the three-judge court entered final judgment "adopting" the plan and relinquished jurisdiction of the case. Thereafter, appeals were taken to this Court by various Ohio voters, who, although members of the class, had been denied the right to intervene or otherwise be heard by the three-judge court. Those appeals were dismissed for want of jurisdiction,[6] as were others later taken to the United States Court of Appeals for the Sixth Circuit. No appeals were taken to this Court or to the court of appeals by any of the named parties to the *Jordon* action.

Thereafter, petitioner commenced the action in the Ohio Supreme Court, which led to the issuance of the temporary restraining order and injunction now under review.

* * *

Immediately after the district court's June 11, 1973, injunction order, petitioner filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit. On November 9 the Sixth Circuit dismissed that appeal without hearing oral argument. (App. 1a). Petitioner's contentions in the Sixth Circuit, that Judge Battisti's injunction against any state court litigation of the 1971 plan's validity under the Ohio Constitution was inconsistent with the Anti-Injunction

[6] October Term, 1971, No. 71-1439.

Statute (28 U.S.C. § 2283) and settled principles of comity and federalism, were thus left completely unresolved.

Thus, by virtue of the district court's termination of petitioner's action in the Ohio Supreme Court and the ensuing permanent injunction, unless a writ of certiorari is granted, the Ohio Supreme Court will never be permitted to pass upon the substantial claims that the 1971 reapportionment plan does not comport with the Ohio Constitution. Indeed, that court will have been forever divested of jurisdiction, made exclusive by the Ohio Constitution, to decide this issue of paramount state concern, without even being advised of the reason for such divestiture.

REASONS FOR GRANTING THE WRIT

The district court's injunction, which forever restrains the Ohio Supreme Court from exercising its original jurisdiction to determine the constitutionality under the Ohio Constitution of the 1971 Ohio legislative reapportionment plan, violates the federal Anti-Injunction Statute, 28 U.S.C. §2283, ignores recent decisions of this Court which articulate the comity owed to state courts by federal judges, disregards the repeated declarations of this Court that state concerns should be carefully considered in a reapportionment case, and constitutes a direct abridgment of petitioner's First Amendment rights. Accordingly, this case involves a striking abuse of a federal district judge's equity powers which should be corrected by this Court.

I

It has been the law of the land since 1793 that a federal court's authority to enjoin state court pro-

ceedings can be exercised in only the most compelling and limited circumstances.[7] The current codification of this basic principle, the Anti-Injunction Statute, 28 U.S.C. §2283, provides that a federal court may enjoin state court proceedings only where "expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

In applying this statutory limitation on the power of the federal judiciary, this Court has repeatedly ruled that these statutory terms must be given their plain meaning and that the narrow exceptions set forth in the statute "should not be enlarged by loose statutory construction." *Atlantic Coast Line R.R. Co.* v. *Brotherhood of Locomotive Engineers,* 398 U.S. 281, 287 (1970). More importantly, this Court has recognized that anything other than a strict interpretation of the statute would be incompatible with our federal system of government:

> Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of § 2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion. 398 U.S. at 297.

See also *Amalgamated Clothing Workers of America* v. *Richman Bros.,* 348 U.S. 511 (1955). *Cf. Toucey* v. *New York Life Ins. Co.,* 314 U.S 118 (1941).

Judge Battisti's justification for enjoining petitioner's Ohio litigation fails to satisfy these strict stand-

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[7] See Act of March 2, 1793, § 6, 1 Stat. 335.

ards. The injunction rests solely on the alleged necessity to protect the prior judgment of a three-judge district court which had held only that the 1971 reapportionment plan complied with the one-man, one-vote requirement. But even if a single district court judge can issue an injunction "to protect or effectuate" judgments of a three-judge district court, the substantive inappropriateness of the injunction in this case is manifest.

As disclosed by the orders of the three-judge court and the remarks of all three judges during oral argument, that court did not render any judgment on the Ohio constitutional issues which qualifies for protection under the exception in §2283. The judgment of the three-judge court was simply that the 1971 plan was consistent with the one-man, one-vote standard. Since there are alternate reapportionment plans which conform with the Ohio Constitution without offending the one-man, one-vote standard, petitioner's action in the Ohio Supreme Court did not represent a threat to the three-judge court's judgment.

II

Even if the Anti-Injunction Statute were not an absolute bar to the issuance of Judge Battisti's injunction, this Court should nevertheless strike down that injunction as a flagrant abuse of discretion inconsistent with long-standing principles which govern the relationship between the federal government and the several states. *Younger* v. *Harris,* 401 U.S. 37 (1971); *Mitchum* v. *Foster,* 407 U.S. 225 (1972).

Speaking for the Court in *Younger,* which struck down a federal injunction against a state court prosecution, Justice Black set forth with his characteristic

clarity the basic principles of comity that mandate respect by a federal court for a state's judiciary:

> [C]omity . . . is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism" and one familiar with the debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." 401 U.S. at 43.

Thus, *Younger* v. *Harris* represents a ringing affirmation of the principles of comity which, even apart from the Anti-Injunction Statute, compel the greatest deference by federal judges who are asked to intrude upon state court proceedings. Those principles were clearly transgressed by the broad and preemptive injunction entered by Judge Battisti in this case.[8]

In *Mitchum* v. *Foster,* involving a federal injunction against a state civil proceeding, the Court held that 42 U.S.C. §1983 was an Act of Congress within the

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[8] Mr. Justice Stewart's concurring opinion in *Younger* recognized that the Court did not there have before it a case involving a federal injunction against a state civil proceeding, such as the one involved in this case. 401 U.S. at 55. However, his suggestion that "the offense to state interests [arising out of a federal injunction] is likely to be less in a civil proceeding" than in a criminal proceeding, 401 U.S. at 55 n. 2, is plainly inapplicable in a reapportionment case where the state's interest goes to the very integrity of the state's legislative and electoral processes.

meaning of the "expressly authorized" exception in the Anti-Injunction Statute. Thus, the case was remanded to a three-judge district court for a determination whether an injunction was proper in view of:

> the principles of equity, comity and federalism . . . [which] must restrain a federal court when asked to enjoin a state court proceeding. 407 U.S. at 243.

While the *Mitchum* opinion does not delineate the specific standards that a federal court must use when asked to enjoin state civil proceedings, the opinion in no way sanctions such an injunction under anything other than the "exceptional circumstances" described in *Younger* v. *Harris:*

> . . . where irreparable injury is "both great and immediate," . . . where the state law is "flagrantly and patently violative of expressed constitutional prohibitions" . . . or where there is a showing of "bad faith, harassment, or . . . other unusual circumstances that would call for equitable relief." 407 U.S. at 230.

It cannot be plausibly maintained that petitioner's action in the Ohio Supreme Court, an action by a single citizen against Ohio's Governor and other public officials, qualifies for abatement under these standards.[9] No threat to federal rights or federal interests

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[9] Additionally, the court in *Mitchum* relied upon "the very purpose of § 1983 . . . to interpose the federal courts between the States and the people, as guardians of the people's federal rights . . . . ." 407 U.S. at 242. This justification for allowing federal injunctions of state court proceedings in § 1983 cases does not permit an injunction against a citizen seeking recourse for the state government's violation of the state's constitution.

was involved in that action. All petitioner seeks is a reapportionment plan that passes muster under both the federal and state constitutions. This Court has consistently recognized the right of a state to achieve this end.

III

We have shown in Parts I and II above that the Anti-Injunction Statute and principles of comity and federalism condemn Judge Battisti's order. There are additional considerations which reinforce that conclusion and which further justify the invocation of this Court's certiorari jurisdiction. For the injunction entered by the district court both compels Ohio citizens to accept a reapportionment plan which is inconsistent with important Ohio constitutional requirements, and abridges directly the exercise by petitioner and his fellow citizens of their rights under the First Amendment.

One of the principal challenges to the 1971 plan is that it does not maintain the integrity of internal political subdivision lines, contrary to the clear mandate of the Ohio Constitution. In addition, contrary to another explicit constitutional provision, the plan uses precincts instead of political subdivisions and city wards in creating many legislative districts. Whatever may have been the practice of some lower federal courts under *Reynolds* v. *Sims,* 377 U.S. 533 (1964), this Court last term in *Mahan* v. *Howell,* 410 U.S. 315 (1973), squarely held that the pursuit of perfect mathematical equality could not justify the disregard of a state's interest in having legislative districts which correspond to internal political subdivisions.

See also *Gaffney* v. *Cummings*, 412 U.S. 735 (1973); *White* v. *Regester*, 412 U.S. 755 (1973). Thus, Judge Battisti's injunction prevents the effectuation of Ohio constitutional provisions which express the same state interests this Court has recognized to be valid.

In addition to the foregoing reasons for granting certiorari, Judge Battisti's injunction order violated petitoner's First Amendment rights under the doctrine recognzed in *NAACP* v. *Button*, 371 U.S. 415 (1963). Clearly petitioner's action in the Ohio Supreme Court "was not a technique of resolving private differences," but rather was "a form of political expression" designed "to achieve legitimate political ends," and thus was protected by the First Amendment. 371 U.S. at 429-30. Accordingly, such activity can be restricted only by the most narrowly drawn court order, and then only if such an order were justified by a compelling governmental interest. 371 U.S. at 435-36, 438. Judge Battisti's injunction, being drawn in the broadest terms imaginable and not being necessary to vindicate any defensible federal interest, satisfies neither of these conditions.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 78-1072

SAMUEL J. JOHNSON
Plaintiff-Appellee

v.

LLOYD GEORGE KEKIS
Appellant

v.

MAHONING COUNTY BOARD OF ELECTIONS, ET AL.,
Defendants-Appellees

Order

APPENDIX

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Before: PECK, MILLER and LIVELY, *Circuit Judges*.

This cause having come on to be considered on the motion of certain of the defendants-appellees to dismiss the appeal, and the Court being fully advised in the premises having concluded for the reasons set forth in the Memorandum Opinion and Order filed by Chief Judge Frank J. Battisti that it is manifest that the questions on which the decision of the court depends are so unsubstantial as not to need further argument (Rule 8, Rules of the Sixth Circuit), and that therefore the said Motion to Dismiss is well taken,

It Is Ordered that this appeal be and it hereby is dismissed. It is further Ordered that the motion of the appellant for an expedited appeal be and it hereby is denied as moot.

ENTERED BY ORDER OF THE COURT
/s/ JAMES H. HIGGINS
Clerk

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 73-1972

SAMUEL J. JORDON
Plaintiff-Appellee

v.

LLOYD GEORGE KERNS
Appellant

v.

MAHONING COUNTY BOARD OF ELECTIONS, ET AL.,
Defendants-Appellees

Order

(Filed Nov. 9, 1973)

Before: PECK, MILLER and LIVELY, *Circuit Judges.*

This cause having come on to be considered on the motion of certain of the defendants-appellees to dismiss the appeal, and the Court being fully advised in the premises having concluded for the reasons set forth in the Memorandum Opinion and Order filed by Chief Judge Frank J. Battisti that it is manifest that the questions on which the decision of the court depends are so unsubstantial as not to need further argument (Rule 8, Rules of the Sixth Circuit), and that therefore the said Motion to Dismiss is well taken,

IT IS ORDERED that this appeal be and it hereby is dismissed. It is further ORDERED that the motion of the appellant for an expedited appeal be and it hereby is denied as moot.

ENTERED BY ORDER OF THE COURT
/s/ JAMES H. HIGGINS
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 71-1130

SAMUEL J. JORDAN, ET AL.,
Plaintiffs

v.

MAHONING COUNTY BOARD OF ELECTIONS, ET AL.,
Defendants

Memorandum Opinion and Order

(Filed June 9, 1973)

Battisti, C. J.

Plaintiffs have requested supplemental orders to protect the judgment already rendered in this case. Specifically, plaintiffs request that all persons included in the plaintiffs' class action be enjoined from relitigating the issues already decided, since it is nothing less than a frivolous effort to prevent this case from ever reaching a final resolution. The relief sought is clearly within the equitable jurisdiction of the Court to effectuate its judgments. *Dugas* v. *American Surety Co.*, 300 U.S. 414, 428-29 (1937); *Root* v. *Woolworth*, 150 U.S. 401, 411-12 (1893); *Hamilton* v. *Nakai*, 452 F.2d 152, 157 (9th Cir. 1972). Therefore, an appropriate injunction is set forth at the conclusion of this opinion.

The relevant facts of this case are clear from the record. On November 15, 1971, a complaint was filed challenging the apportionment plan then in effect for the election of members of the Ohio General Assembly. On November 30, 1971, an order determining the class which plaintiff represented was signed. The state apportionment board was then ordered to submit a new plan no later than December

21, 1971. This was done, and plaintiff filed no objection to the new plan. Final judgment approving this plan was subsequently entered on March 13, 1972.

The respondent herein, Lloyd George Kerns, now contends that he was not within the boundaries defined by the order of class determination and, thus, should not be considered bound by the final judgment. It must be noted at the outset that Mr. Kerns is at best stressing a technicality, for nowhere in his memoranda does he allege lack of notice that this lawsuit was pending. On the contrary, the only inference to be drawn from the facts presented is that he knew of the proceedings throughout [1] and may have actually participated therein. Any attempt by respondent to negate this inference would indeed strain credulity. He is a former state legislator and remains quite active in politics. In fact, his former lawyer, who participated throughout this lawsuit and is a partner of his current lawyer, testified that his political party had solicited respondent for

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[1] It should be noted in this regard that since this class action was not brought pursuant to F.R.Civ.P. 23(b)(3), it is not subject to the individual notice requirement and "opt-out" provision of Rule 23(c). Rather, it sought equitable relief to redistrict the state in accordance with constitutional requirements. Such relief clearly falls within the terms of Rule 23(b)(1) and (2), and personalized notice directed to individual class members is not strictly required in all such cases. *Yaffe* v. *Powers*, 454 F.2d 1362 (1st Cir. 1972); *Johnson* v. *City of Baton Rouge*, 50 FRD 295 (D. La. 1970). The notice to be utilized under these circumstances is within the sound discretion of the Court, and mere notice by publication will usually suffice. *Lopez* v. *Wyman*, 329 F.Supp. 483, aff'd., 404 US 1055 (1972). In the class determination order, judicial notice was taken of the fact that the redistricting issue had already received widespread publicity in the news media throughout the state. Additional notice was entirely unnecessary. For this reason, Mr. Kerns cannot sustain a contention that binding him by the prior proceedings is violative of Due Process for lack of adequate notice, even were he to allege an absence of actual notice, see *Lopez* v. *Wyman, supra*, at 486, which, as noted above, he does not.

the express purpose of continuing the litigation. Furthermore, respondent filed notices of appeal of January 3 and 24, 1972, which would make it impossible for him to seriously contend that he first learned of this action after the final judgment binding all qualified voters was issued on March 13, 1972.

Therefore, the Court will proceed to analyze the technicality which is the essence of Mr. Kerns' argument. He points to the fact that the class determination order referred only to "registered voters," a group to which he does not belong. Rather, he is a "qualified voter," a term applied to those persons eligible to vote without registration under special statutory provisions applicable only to residents of municipalities of less than sixteen thousand people. Section 3503.06 O.R.C. Thus, respondent asserts, the judgment cannot be construed as broadening the class determination order, even though it incorporates language [2] to include all qualified voters, for such a determination would violate his right to Due Process by depriving him of his day in court. Under the facts of this case, this argument is so totally lacking in substance that it casts some doubt on the sincerity of counsel, who is a skillful and learned practitioner in federal court.

Respondent's argument depends entirely upon his overly restrictive interpretation of Rule 23(c)(1).[3] He reads this rule to require that amendments to class determination orders must *always* be made prior to judgment; and, although apparently conceding that he is within the literal language of the judgment, respondent contends that such inclusion is in effect an amendment to the class determination order and, therefore, a violation of Rule 23(c)(1). This

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[2] This language was incorporated from a stipulation to which Mr. Kerns was not a party.

[3] That rule provides in pertinent part: "An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

interpretation, however, fails to take into account the applicable provisions of Rule 60(a).[4]

It is undisputed, as outlined above, that the class determination order referred only to "registered voters," although the complaint recites that the action was brought "... on behalf of all persons throughout the State of Ohio qualified to vote for candidates for membership in the Ohio General Assembly," and the final judgment was made applicable to the latter group. No reason was given by the Court for distinguishing between registered and qualified voters when the class determination order was signed, nor does respondent allege now that any valid reason existed for making such a distinction. Clearly, the interest of these two groups is identical—namely, to effectuate the "one-man, one-vote" principle set forth in *Reynolds* v. *Sims*, 377 U.S. 533 (1964). As such, the omission of either group from any order herein would of necessity be inadvertent, and not indicative of the true intention of the Court[5] as understood by the parties. It would, therefore, be correctable *at any time* by an amendment pursuant to Rule 60(a).

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[4] This rule provides that: "Clerical mistakes in judgments, orders or other parts of the record and *errors therein arising from oversight or omission may be corrected by the court at any time*. . . ." (Emphasis added.) For a discussion of the meaning of this language, see 6A Moore's Federal Practice at 4065-66; 3 Barron and Holtzoff, Federal Practice and Procedure, § 1324, pp. 398-99 (Wright ed. 1958).

[5] In paragraph 4 of respondent's Second Memorandum in these supplemental proceedings, he admits that the Court was probably operating under a mistaken belief as to the actual scope of the class determination order. He further states that this mistake persisted as late as April 11, 1972, after final judgment, when the Court denied Mr. Kerns' motion for clarification. This argument confirms, rather than negates, the propriety of applying Rule 60(a) to the erroneous order, as will be discussed later in this opinion.

As was stated in *Matthies* v. *Railroad Retirement Board*, 341 F.2d 243 (8th Cir. 1965) at 248:

> "All courts have the inherent power to enter orders *nunc pro tunc* to show that a thing was done at one time which ought to have been shown at that time. It is an entry now for something previously done so that the record may actually speak the truth."

There can be little doubt from the record and subject matter of this case as to the intended scope of the class. Thus, to amend the class determination order herein would be merely to "recognize only what was understood, what was intended, what was agreed, and what the court itself had accepted as the resolution of the litigation then pending. No prejudice could possibly result from what the court did." *Pattiz* v. *Schwartz*, 386 F.2d 300 (8th Cir. 1968) (Blackmun, J.). Accordingly, to correct a technical imperfection in the record, the class determination order signed on November 30, 1971, is hereby amended by deleting the words "all registered voters of the State of Ohio" and inserting in their place the following:

> "All persons throughout the State of Ohio who are qualified to vote for candidates for membership in the Ohio General Assembly."

In making the modification to correlate the class determination order with the final judgment, the Court emphasizes that respondent has made no attempt to show that the correction will be prejudicial to him in any way. As noted previously, he appears to have participated substantially in the initial proceedings. This participation includes an appeal of the decision of the three-judge court to the Supreme Court, and even to the Sixth Circuit Court of Appeals, all before the entry of final judgment. Furthermore, it would seem that a claim of prejudice, to be sustained, would require at a minimum a showing that:

1. The aggrieved party's interest was different from the putative class representative, or

2. The representation of the class in the initial proceeding was inadequate.[6]

With respect to these elements, respondent Kerns does not even allege that his interest was different from the representative plaintiff. In fact, in the briefs he filed in the Supreme Court and the Court of Appeals, he alleged that his interests were "identical with those of members of the class represented by the plaintiff above named. . . ." Mr. Kerns did, however, in an amended notice of appeal assert that he believed the representation of the class to be inadequate. He did not specify any basis for his belief. However, it may be inferred from his memoranda filed in these supplemental proceedings that his dissatisfaction resulted only from the political makeup of the apportioned districts, and not from a violation of any cognizable constitutional right. He does not dispute that the original apportionment was unconstitutional[7] or that the final plan accepted by plaintiff satisfied constitutional mandates. Thus, his assertion as to the adequacy of representation does not even rise to the level of a colorable claim.

It is, therefore, clear that respondent's argument under the facts of this case amounts to an exercise in frivolity, or at best to a hypothetical question as to whether one may ever contest a modification of class boundaries which is made either simultaneously with, or subsequent to, the entry of judgment in this type of class action. While this might prove to be an interesting subject for general discussion, it requires no further response in this case. Since respondent is properly a member of the class in case number C71-1130, he is bound by the judgment in that action.

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[6] These elements would also have to be shown as a prerequisite for respondent's claim that inadequate time was permitted in which to file objections to the class determination order.

[7] This approach would have been somewhat difficult, since the unconstitutionality of the original plan was conceded at the outset by all, including counsel for the State of Ohio.

To summarize, counsel for respondent has asked this Court to hold that the inclusion of Mr. Kerns in the final class judgment amounts to a violation of his Due Process rights. This request is made without a demonstration that such inclusion would be prejudicial, due to either a lack of appropriate notice, an inadequacy of representation, or a dissimilarity of interests between respondent and the plaintiff in the initial proceeding. Clearly, what we have here is an effort, and a rather shabby one at that, to utilize a solicited plaintiff to reopen a case already litigated, decided, and appealed. Such activity cannot be too strongly condemned. These subsequent proceedings are not a legitimate attempt to vindicate basic rights, as counsel would have us believe, but rather to use the Court as a political forum. Needless to say, such conduct borders dangerously on the realms of misrepresentation and contempt. The Court, however, unlike Mr. Kerns, is not inclined to further prolong a case which should have ended long ago. Thus, an injunction against further proceedings will be the only action taken at this time.

Accordingly, all parties to, and class members in, Civil Action No. C-71-1130 are hereby permanently restrained and enjoined from litigating any matters which were, or could have been, raised in Civil Action No. C 71-1130, in any state or federal court (except as may be provided by law for the appeal of any order in Civil Action No. C 71-1130 to the United States Court of Appeals or to the United States Supreme Court), and further that all such persons are permanently restrained and enjoined from filing any new actions affecting any matters which were, or could have been, raised herein and otherwise from taking any actions designed to or which will have the effect of interfering with the carrying out of the orders of this Court; and all such persons are permanently restrained and enjoined from taking any legal action (except as may be provided by law for the appeal of any order of this Court in Civil Action No. C 71-1130 to the United States Court of Appeals or to

the United States Supreme Court) designed to or which will have the effect of impeding or interfering with the carrying out of any election pursuant to the plan of apportionment approved and adopted by the orders of this Court entered December 22, 1971, and March 13, 1972. Furthermore, the defendant Ted W. Brown, as Secretary of State and chief election officer of the State of Ohio, his successor or successors, and all those acting by and under his authority, are hereby ordered and directed to accept filings and conduct elections only in accordance with the provisions of the March 13, 1972, order of this Court adopting a legislative plan of apportionment so long as it remains in effect or in conformity with the election statutes of the State of Ohio which are not inconsistent therewith. The said Secretary of State, his successor or successors, and all those acting by and under his authority are enjoined from accepting filings or declaring the results of any election, otherwise than in conformity with this order.

IT IS SO ORDERED.

/s/ FRANK J. BATTISTI
Frank J. Battisti
Chief Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action No. C71-1130

(Filed Apr. 25, 1973)

Temporary Restraining Order

This cause came on to be heard on motion of the Apportioning Persons of the State of Ohio for a Supplemental Order in this cause, to-wit: a temporary restraining order pursuant to Rule 65(b), Federal Rules of Civil Procedure, and upon the affidavit of James A. Laurenson, attached thereto, and the Court being satisfied that all parties received sufficient notification, and having heard counsel for the moving parties and the respondent, this Court finds:

That the Complaint in Civil Action No. C71-1130 challenged the original reapportionment plan as defective under both the state *and* federal constitutions, and prayed for injunctions requiring the movants to establish a plan that satisfied the requirements of the state *and* federal constitutions; that on December 3, 1971, this Court ordered the movants to establish a constitutionally sound plan, noting, as grounds therefor, state and federal constitutional defects in the original one; that this Court, on December 21, 1971, held Messrs. Norris and McElrory in contempt of its December 3, 1971 Order for attempting to litigate almost the identical issues raised in Case No. 73-270 in an original action brought by them in the Supreme Court of Ohio, and stated that "that case raised issues under advisement by the three-judge court;" that on December 22, 1971, this Court adopted the movants' revised plan for the 1972 election, but allowed 60 days for the filing of any state or federal constitutional objections, providing all parties ade-

quate opportunity to raise any state *or* federal constitutional challenges; that no objections were filed and this Court entered a Final Order on March 13, 1972, adopting the plan for the remainder of the decennium; that the Complaint in Case No. 73-270 raises similar issues to the Complaint filed in the Ohio Supreme Court in 1971, *i.e.*, that the plan violates the state *and* federal constitutions; that the Complaint in Case No. 73-270 requests the Supreme Court of Ohio to set aside a plan that was adopted by Order of this Court for 1972 and for the decennium, and to set aside the 1972 elections that were ordered by this Court; that this Temporary Restraining Order is necessary to prevent Messrs. Kerns and McElrory from drawing the state and federal judicial systems into conflict, to prevent relitigation of this cause in another forum and that this Order is authorized pursuant to 28 U.S.C. §§ 1651 and 2283 (1970); that, unless this Temporary Restraining Order is granted, the moving parties shall be required to move or plead in the Supreme Court of Ohio on or before May 1, 1973 in violation of the Order of this Court entered December 3, 1971; that, unless this Temporary Restraining Order is granted, the moving parties and the state and federal judicial systems will suffer grave and irreparable harm and damage, for which there is no adequate remedy at law.

Now, Therefore, It Is Ordered that Lloyd George Kerns, his agents, employees, and attorneys, and all persons acting by, under, for, or with him are enjoined to withdraw, dismiss, and terminate, on or before April 27, 1973, an original action filed in the Supreme Court of Ohio on March 30, 1973, captioned *Lloyd George Kerns* v. *John J. Gilligan, et al.*, Case No. 73-270, and that all parties to, and class members in, this cause be, and they hereby are, enjoined from proceeding further in Case No. 73-270 in the Supreme Court of Ohio or commencing or proceeding in any other action in any court designed to, or which will have the effect of, interfering with any order of this Court until further order of this Court.

It is further ordered that the hearing on the moving parties' motions under Rule 65(a), Federal Rules of Civil Procedure, shall be held on May 3, 1973, at 10:00 a.m., or as soon thereafter as the Court's docket permits.

It is further ordered that notice by telephone of this order on counsel for all parties shall be deemed sufficient notice.

Issued at 12:23 p.m., April 25, 1973.

No Bond is Required.

/s/ FRANK J. BATTISTI

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 71-1130 Y

Order

(Filed Mar. 16, 1972)

Before CELEBREZZE, Circuit Judge; BATTISTI, District Chief Judge; and WALINSKI, District Judge.

Pursuant to the December 22, 1971, Order of this Court, the plaintiffs were granted leave to examine the reapportionment plan and file objections thereto. The plaintiffs have filed their report containing no objections. Therefore, the reapportionment plan is adopted; and, accordingly, there is no compelling reason to retain jurisdiction.

It is so ordered.

/s/ ANTHONY J. CELEBREZZE
Anthony J. Celebrezze
United States Circuit Judge

/s/ FRANK J. BATTISTI
Frank J. Battisti
Chief Judge

/s/ NICHOLAS J. WALINSKI
Nicholas J. Walinski
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 71-1130 Y

Memorandum Opinion and Order

Before: CELEBREZZE, Circuit Judge; BATTISTI, District Chief Judge; and WALINSKI, District Judge.

This Court in its order of December 3, 1971, found that the apportionment plan adopted by the Board of Apportionment was unconstitutional on its face. This Court thereupon directed that the plan be resubmitted to the Board of Apportionment for the purpose of preparing and submitting a constitutionally sound plan to the Court by December 21, 1971. On December 22, 1971, this cause came on for hearing. A plan was submitted and evidence received.

On consideration of the evidence thus far in the case, the Court concludes that the Board of Apportionment, using the best available 1970 official census or census related data, has made a good faith effort to apply the one-man, one-vote doctrine in devising a plan for redistricting the General Assembly of the State of Ohio, and that the plan as presented to the Court on December 21, 1971, insofar as practicable, meets the one-man, one-vote standard required by the Constitution of the United States.

Therefore, it is concluded that the plan as presented to this Court meets the one-man, one-vote standard required by the Constitution of the United States.

In light of plaintiffs' motion seeking a reasonable time in which to further examine the entire plan submitted to plaintiffs and this Court this day, leave is granted to examine same, to file objections thereto, and to be prepared

to proceed not later than sixty days from the date of entry of this order.

Since time is of the essence in that the filing date for the primary election is February 2, 1972, and the Constitution of the State of Ohio requires that candidates be afforded a thirty-day period in which to change their residence prior to the filing date, the plan is adopted for the 1972 election of the Ohio General Assembly. See *Wells* v. *Rockefeller*, 394 U.S. 542, 547 (1969).

This Court retains jurisdiction over this matter.

IT IS SO ORDERED.

/s/ ANTHONY J. CELEBREZZE
Circuit Judge

/s/ FRANK J. BATTISTI
Chief Judge

/s/ NICHOLAS J. WALINSKI
District Judge

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1973
No. 73-920

LLOYD GEORGE KERNS,
Petitioner,

vs.

SAMUEL J. JORDON, MAHONING COUNTY BOARD OF ELECTIONS, JOHN J. GILLIGAN, Governor of the State of Ohio, JOSEPH T. FERGUSON, Auditor of the State of Ohio, TED W. BROWN, Secretary of State of the State of Ohio, ANTHONY O. CALABRESE, SR., Member, Ohio Senate, and ROBERT A. MANNING, Member, Ohio House of Representatives,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS, JOHN J. GILLIGAN, JOSEPH T. FERGUSON, TED W. BROWN AND ANTHONY O. CALABRESE, IN OPPOSITION

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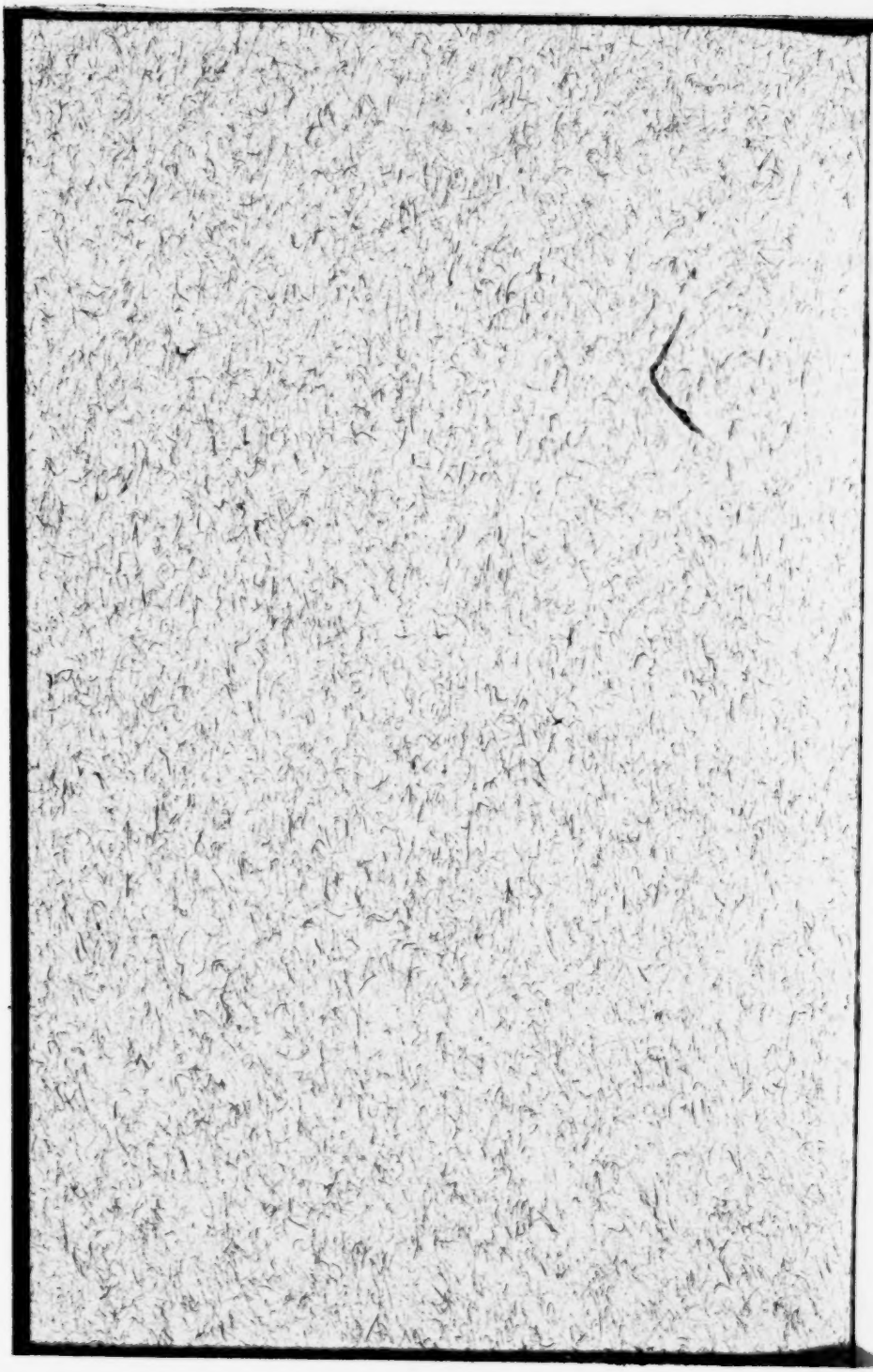

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Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS, JOHN J. GILLIGAN, JOSEPH T. FERGUSON, TED W. BROWN AND ANTHONY O. CALABRESE, IN OPPOSITION

OPINIONS BELOW

Neither the order of the United States Court of Appeals for the Sixth Circuit nor the memorandum opinion and order of the United States District Court for the Northern District of Ohio are reported. Both are reprinted in this brief at pages A23 and A31, as Appendix M and Appendix N, respectively.

JURISDICTION

Petitioner has not met the jurisdictional requisites of 28 U.S.C. §1254(1) for the reason that he was not a "party" to the action in the district court. *In re Leaf Tobacco Board*, 222 U.S. 578, 581.

QUESTION PRESENTED

Whether either the Constitution or a statute deprives a district judge of the power to protect its judgment by enjoining any interference with that judgment by individuals seeking redress in other courts.

STATUTES INVOLVED

28 U.S.C. §1651. Writs:

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

"(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. As amended May 24, 1949, c. 139, §90, 63 Stat. 102.

28 U.S.C. §2202. Further relief:

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

28 U.S.C. §2283. Stay of State court proceedings:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protest or effectuate its judgments.

STATEMENT OF THE CASE

This action is a petition by Lloyd George Kerns to review an order of the United States District Court for the Northern District of Ohio, Eastern Division, which was issued June 11, 1973, pursuant to 28 U.S.C. §§1651, 2283 and 2202 (1970), to protect and effectuate the final judgment issued by a three-judge court on March 13, 1972 (Appendix G).

On November 15, 1971, Samuel J. Jordon, a citizen of the United States, a resident of Austintown, Mahoning County, Ohio, and a qualified voter under the laws of the State of Ohio, brought this action on his own behalf and on behalf of all persons throughout the State of Ohio qualified to vote for candidates for membership in the Ohio General Assembly, challenging the Ohio legislative apportionment, and asked that its use be prohibited for violation of the Fourteenth and Fifteenth Amendments of the United States Constitution and of Articles V and XI of the Ohio Constitution.

Subsequently, on November 20, 1971, appellant, Alan E. Norris, filed a similar suit in the Ohio Supreme Court entitled Norris v. Gilligan, et al., case number 71-748.

On November 30, 1971, the Court, after holding a hearing, ruled that the complaint of Samuel J. Jordon

was a proper matter for submission to a three-judge court, and that Samuel J. Jordon had standing to sue.

On November 30, 1971, the Court signed a class action order holding that plaintiff's action may be maintained and recognized the same as a class action, Rule 23(b)(2), on behalf of all registered voters of the State of Ohio. The Court took judicial notice of the fact that the lawsuit had received widespread, pervasive publicity through the mass news media, and ordered any member of the class who believed that his interest was not or would not be fairly and adequately represented by the party plaintiff to file his appearance with the Court by December 3, 1971 (Appendix A).

On December 3, 1971, a hearing was held before the three-judge court. It found that the plan adopted September 30, 1971, by the Ohio Apportionment Board was unconstitutional, in that, inter alia, it violated the one man, one vote requirement, and ordered the Ohio Apportionment Board to present a constitutionally sound plan to the Court no later than December 21, 1971. The Court further found the case to be a properly constituted class action to which no objection had been filed, and enjoined all members of the class from litigating any issues raised in the action in any other court during the pendency of the action (Appendix C).

On December 13, 1971, Honorable Frank J. Battisti found Alan E. Norris and John McElroy (counsel for petitioner, Kerns, through the Court of Appeals stage in this action) in contempt of court because of proceeding with the action filed November 20, 1971, in the Supreme Court of Ohio under case number 71-748 in derogation of the Court's order of December 3, 1971. This finding of contempt was later unanimously ratified by the three-judge court.

On December 20, 1971, Alan E. Norris filed with the Court a motion to intervene, which was denied by the Court by order filed December 22, 1971. (Neither of the other two interested parties, namely Jacob A. Shawan or petitioner, Lloyd George Kerns, filed motions to intervene.)

In accordance with the Court's order of December 3, 1971, the Board of Apportionment, on December 21, 1971, submitted a plan of apportionment to the three-judge court, and on December 22, 1971, a hearing was had. The plan was submitted and evidence received. The Court found that the plan, as presented, met the one man, one vote standard required by the Constitution of the United States, and adopted the plan for the 1972 election of the Ohio General Assembly. However, the Court deferred a final order on the plan for a period of 60 days to afford plaintiff's counsel an opportunity to study it for other state and federal constitutional infirmities (Appendix E).

At no time during this 60-day period did Kerns, Norris, Shawan or anyone else present objections to the apportionment plan to counsel for original plaintiff, Jordon.

Accordingly, on March 2, 1972, counsel for Samuel J. Jordon advised the Court that they had no objection to the plan of reapportionment.

On March 13, 1972, the three-judge court issued its final order adopting the plan (Appendix G).

Petitioner, Lloyd George Kerns, along with Alan E. Norris and Jacob A. Shawan, filed appeals directly to the Supreme Court of the United States, same being numbered on the docket of the Supreme Court of the United States as 71-1109 (34 L. Ed. 2d 66) and 71-1439 (34 L. Ed. 2d 323), wherein the Supreme Court of the United

States on October 10, 1972, dismissed the appeals for want of jurisdiction, and on November 20, 1972, denied appellants' application for specification of grounds for finding want of jurisdiction and rehearing. Kerns' notice of appeal to this Court in said appeal was, in part, from the district court order: "(4) Prohibiting all members of the class, to-wit: every registered voter in Ohio, from litigating any 'issue raised' in the three-judge district court action in any other court during the pendency of the action." (Kerns' notice of appeal to the United States Supreme Court was filed January 3, 1972.)

Appellants then attempted to invoke the jurisdiction of the Circuit Court of Appeals for the Sixth Circuit, same being numbered on the docket of the Circuit Court of Appeals as 73-1003, 73-1004 and 73-1005, wherein the Court, after Kerns and Shawan had, by stipulation, withdrawn their appeals, on April 18, 1973, dismissed the appeal of Norris for want of jurisdiction, and on April 30, 1973, denied Norris' petition for rehearing (Appendix J).

On March 30, 1973, during the pendency of the heretofore mentioned appeals, petitioner filed an original action in the Supreme Court of Ohio, captioned Lloyd George Kerns v. John J. Gilligan, et al., case number 73-270, and upon motion of appellees, pursuant to 28 U.S.C. §§1651, 2283 and 2202, petitioner was, by order of the district court issued April 25, 1973, directed to dismiss his action in the Supreme Court of Ohio, and enjoined from proceeding further in said case. Further, petitioner was, by virtue of the order issued on June 11, 1973, by the district court, enjoined from litigating any matter which was, or could have been raised in civil action number C71-1130 in the district court (Appendix M).

Petitioner, by filing his original action in the Supreme Court of Ohio and by this petition, is attempting to reliti-

gate all of the matters which were decided by the three-judge court culminating in the final order entered on March 13, 1972, and orders entered subsequent to March 13, 1972, to protect and effectuate the final judgment of the three-judge court.

The petitioner, Lloyd George Kerns, is a member of the class represented by the attorneys for Samuel J. Jordon. (Express holding of order issued April 11, 1972, by the three-judge court.) No intervention was requested by or granted to petitioner in the case entitled Samuel J. Jordon v. Mahoning County Board of Elections, et al., and, therefore, petitioner has no standing to file this petition, since he was not a party to the action. Petitioner states in his petition that: "Jurisdiction of this court is invoked under 28 U.S.C. §1254(1)", but that statute clearly requires that the petitioner be a "party". Thus, petitioner has failed to invoke the jurisdiction of this Court for the purpose of granting a writ of certiorari.

On December 21, 1971, Robert A. Manning, one of the named parties to the Jordon action, filed an application in the United States Supreme Court, number A638, to stay judgment pending review on appeal to the United States Supreme Court. On the same date, December 21, 1971, Justice Potter Stewart denied the application. On June 6, 1972, Robert A. Manning filed a motion in the Supreme Court of the United States to dismiss the appeal.

On July 11, 1973, Robert A. Manning, one of the defendants in the original Jordon action, filed an appeal directly to the Supreme Court of the United States, being number 73-453 on the docket of said Court (..... L. Ed. 2d .....), appealing the final orders, including the one issued on June 11, 1973, by the district court, which appeal raised similar questions to the present petition for a writ of certiorari. The Supreme Court of the United States,

on December 3, 1973, dismissed the appeal for want of a substantial federal question (Appendix O).

Petitioner, on July 6, 1973, filed an appeal to the United States Court of Appeals for the Sixth Circuit, same being numbered 73-1972 on the docket of the Circuit Court of Appeals, wherein the court, on November 9, 1973, on motion of respondents, John J. Gilligan, Joseph T. Ferguson, Ted W. Brown and Anthony O. Calabrese, dismissed the appeal (Appendix N).

Petitioner, by this action, is attempting to vitiate the district court's order of June 11, 1973, so that he may file another original action in the Ohio Supreme Court, in order to have the Supreme Court of Ohio rule on questions which have already been raised before and ruled on by the three-judge district court, the United States Court of Appeals for the Sixth Circuit, and the United States Supreme Court in three prior appeals, being numbered on the docket of the Supreme Court of the United States as 71-1109 (34 L. Ed. 2d 66), 71-1439 (34 L. Ed. 2d 323) and 73-453 (..... L. Ed. 2d .....).

The identical questions being raised by petitioner in his petition for certiorari were before the United States Court of Appeals for the Sixth Circuit in the case docketed under number 73-1972, which appeal was dismissed on motion of the respondents (Appendix N).

Petitioner has in no way demonstrated that he will be injured by not having the Supreme Court of Ohio relitigate the same question which has been decided by the three-judge district court and previously reviewed by the United States Court of Appeals for the Sixth Circuit and this United States Supreme Court.

A copy of each of the opinions and orders referred to above is in the attached Appendix.

Petitioner, Lloyd George Kerns, would have this Court believe that he is a public-spirited citizen interested in the welfare of the electorate of the State of Ohio, but a reading of the transcript of the proceedings (pages 31-34) had before the Honorable Frank J. Battisti, Chief Judge of the United States District Court for the Northern District of Ohio, on May 21, 1973, shows that he was selected to be a litigant by the Republican State Headquarters at the request of Attorney John McElroy. Mr. McElroy, former counsel for the petitioner, testified on cross-examination as follows:

"By Mr. Ortenzio:

Q. Mr. McElroy?

A. Yes.

Q. You stated that you first started representing Mr. Kerns in late December of 1971; is that correct?

A. That's correct.

Q. Did you know Mr. Kerns prior to the time you represented him?

A. I knew him when I was a member of the Ohio General Assembly.

Q. How did it come about that you represented him? Did he call you for an appointment?

Mr. Duffey: Objection, your Honor. I think this goes into a matter of privilege that Mr. McElroy cannot testify to.

The Court: Overruled.

The Witness: Restate the question, please?

Q. How did it come about that you had an appointment with Mr. Kerns in late December? Did he call you for an appointment?

A. Well, specifically, I had talked with some of the people at Republican State Headquarters about the problem and said we needed in the action somebody in the action that was a resident in an area of non-registration of Ohio.

Q. Did they suggest Mr. Kerns to you?

A. In consequence of that act, Lloyd George Kerns got in touch with me.

Q. Do you recall, was it by telephone, by letter or what?

A. I don't recall. I probably have notes in my office that would show something on it but—

The Court: When you say you had indicated to whoever you were talking to that you needed someone who was a non-registered voter in Ohio, did you mean by that someone who was a non-registered voter in Ohio and also qualified to vote for the members of the General Assembly of Ohio?

The Witness: Yes. I was looking specifically, your Honor, for someone who was not a member of the class as determined by the class action order but who would have the interests that a member of the class would have.

Mr. Duffey: Your Honor, I also represent Mr. McElroy personally. I call the Court's attention to the fact that Mr. McElroy was out of the practice of law some 25 or so years and has only been most recently back in active practice, and I would like your indulgence to remind him that with respect to certain matters he has a legal obligation not to testify—

The Court: He hasn't testified to any—

Mr. Duffey: I think you were inquiring about conversations with other persons.

The Court: Just a moment. Let's not lecture the witness at this point.

Mr. McElroy did not state that the persons he was talking to were his clients. He was at that time talking about acquiring a client, I assume.

Mr. Duffey: The reason I suggested the admonition, your Honor, is that I am familiar with Mr. McElroy's clients because he is associated in my law firm, and our law firm does represent the Republican Financial Committee and certain members of the Republican Central Committee, and I thought perhaps Mr. McElroy might have neglected to remember who all of his clients were.

The Court: Well, what he's said is on the record and—

Mr. Ortenzio: May I have just one more question, your Honor?

The Court: Yes.

By Mr. Ortenzio:

Q. Mr. McElroy, I believe you testified you went to Republican Headquarters because you were looking for someone who, in your opinion, did not fit as a member of this class?

The Court: Who had the same interests but was not a member.

A. Who had the same interests but who would be able to carry the matter forward.

Q. And they furnished Mr. Kerns for you?

A. Yes."

ARGUMENT

The district court's injunction reflects the highest regard for principles of comity and federalism because it was issued to prevent vexatious litigants from attempting to draw the state and federal courts into conflict. The Attorney General of Ohio filed a motion for supplemental orders, pursuant to 28 U.S.C. §§1651, 2283, 2202 (1970), clearly stating that orders were *not* sought "against the Supreme Court of Ohio, but rather against any persons who would attempt to use that Court as an instrumentality to defeat the December 22, 1971 and March 13, 1972 Orders (of the three-judge) court."

A. The District Court Had Jurisdiction to Grant the Relief Requested.

As was indicated above, on December 22, 1971, the district court "adopted" the respondents' revised reapportionment plan for the 1972 elections of the General Assembly, and on March 13, 1972, having given all class members opportunity to file any federal or state constitutional objections to the plan, and having received none, the Court "adopted" the plan for the remainder of the decennium, requiring all elections for the remainder of the decennium to be conducted under it. As has also been indicated, Mr. Kerns had filed an action in the Supreme Court of Ohio challenging the legal basis for the Court's December 22, 1971 injunction requiring the elections to proceed and praying that it, as well as the March 13, 1972 order, be set aside.

The federal "All Writs Statutes", 28 U.S.C. §1651 (1970), provides:

> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs neces-

sary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[1]

In *Skolnick v. State Electoral Board of Illinois*, 336 F. Supp. 839, 869-76 (N.D. Ill. 1971), the three-judge court, following the procedures indicated as appropriate in *Reynolds v. Sims*, 377 U.S. 533 (1964), "adopted" a reapportionment plan for the State of Illinois. The court's final order adopting the plan was entered on September 21, 1971. On October 5, 1971, parties to the original challenge to the plan filed an original action in the Illinois Supreme Court. In *Skolnick*, the state court action purported to challenge the plan only as violative of the Illinois Constitution. *Skolnick, supra*, 336 F. Supp., at 870.

In *Skolnick*, the court granted exactly the relief sought herein: temporary, preliminary and permanent injunctions against further proceedings in the Illinois Supreme Court or anywhere else to relitigate issues which were or could have been raised in the original district court action. See *Moss v. Burkhardt*, 220 F. Supp. 149, 160-63 (W.D. Okla. 1963), *affirmed*, 378 U.S. 558, granting similar injunction.

It is well established that the rendering of a final judgment does not relieve a federal court of jurisdiction to enter supplemental orders such as those that were requested herein. In fact, under 28 U.S.C. §2283, a prior final judgment by a federal court is a *prerequisite* to the issuance of an order prohibiting relitigation. See generally, 1A J. W. MOORE, FEDERAL PRACTICE ¶ 0.224 at page 2616 (2d ed. 1965).

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1. As will be demonstrated below, the federal anti-injunction statute, 28 U.S.C. §2283 (1970), expressly authorized the district court to grant the relief sought pursuant to 28 U.S.C. §1651.

Finally, the relief sought herein was properly granted by supplemental orders. *Berman v. Denver Tramway Corp.*, 197 F.2d 946, 950 (10th Cir. 1952), supplemental proceeding by a non-party to enforce declaratory judgment commenced 25 years after the entry of the final order:

> "A federal court is clothed with power to secure and preserve to parties the fruits and advantages of its judgment or decree. In the appropriate exercise of that power, the court has jurisdiction through means of a supplemental proceeding to enjoin the relitigation in a state court of a matter litigated, determined, and adjudicated by its valid decree regularly entered, if the result of the relitigation would be to destroy the effect of the decree rendered in the United States Court. And jurisdiction of the court to entertain such a supplemental proceeding is not lost by the intervention of time or the discharge of the res from the custody of the court. A supplemental proceeding of that kind may be entertained where the relitigation in the state court would result in nullifying the judgment or decree of the United States Court, or would render doubtful the rights of the parties in respect to the effectiveness of such judgment or decree."

B. The Federal Anti-Injunction Statute, 28 U.S.C. §2283, Expressly Authorized the District Court to Grant the Injunctive Relief Requested.

1. The complaint filed by Mr. Kerns in the Ohio Supreme Court in case number 73-270 was an attempt to relitigate issues fully adjudicated in the United States District Court action.

On weaker facts than are present in the instant case, the three-judge court, in *Skolnick v. State Electoral Board*

of Illinois, 336 F. Supp. 839 (N.D. Ill. 1971) found an attempt to relitigate. In *Skolnick*, after the court had adopted a plan as the court below did on March 13, 1972, the plan was challenged in the Illinois Supreme Court solely on state constitutional grounds. *Skolnick, supra*, 336 F. Supp., at 870-71. Here, Kerns' and McElroy's complaint also alleged violations of the federal constitution. In *Skolnick*, there was no attempt to upset elections ordered by the three-judge court. Here there was.

In addition to a relitigation of the same issues that were previously before the district court, the original action in case number 73-270 involved the same parties. Defendants there were the apportioning persons of the State of Ohio. And, as was demonstrated in the statement of the case, the complaint was filed by Kerns, who was expressly identified by order of the three-judge district court to be within the class of plaintiffs.

2. The federal anti-injunction statute, 28 U.S.C. §2283, was intended to give federal courts power to restrain attempts, such as the complaint in Ohio Supreme Court case number 73-270, to relitigate issues adjudicated in federal courts.

The federal anti-injunction statute, 28 U.S.C. §2283, was designed to give persons such as the respondents herein a right to seek, and to give the federal court power to grant, injunctions against actions brought in state courts to relitigate issues already adjudicated by federal courts, without requiring persons such as the respondents first to plead the federal judgment as *res judicata* or collateral estoppel as a defense to the state case. See generally 1A MOORE, FEDERAL PRACTICE ¶ 0.208(1)-(3), 0.224 at pages 2301-24, 2614-16 (2d ed. 1965). Section 2283 provides:

"A court of the United States may not grant an injunction to stay proceedings in a State court except (1) as expressly authorized by Act of Congress, or (2) where necessary in aid of its jurisdiction, or (3) to protect or effectuate its judgments."

In 1948, in reaction to *Toucey v. New York Life Insurance Co.*, 314 U.S. 118 (1941) (cited by petitioner in his petition at page 10) Congress amended the anti-injunction statute to its current form. The reviser's note (see 28 U.S.C.A. §2283) plainly states that section 2283 was adopted to overrule *Toucey* and to empower federal courts to enjoin relitigation in state courts:

"The exceptions specifically include the words 'to protect or effectuate its judgments', for lack of which the Supreme Court held that the Federal courts are without power to enjoin relitigation of cases and controversies fully adjudicated by such courts. (See Toucey v. New York Life Insurance Co., 62 S.Ct. 139, 314 U.S. 118, 86 L.Ed. 100. A vigorous dissenting opinion (62 S.Ct. 148) notes that at the time of the 1911 revision of the Judicial Code, the power of the courts of the United States to protect their judgments was unquestioned and that the revisers of that code noted no change and intended no change.)

"Therefore the revised section restores the basic law as generally understood and interpreted prior to the Toucey decision." *Id.*

It is now clear that a federal court, under 28 U.S.C. §2283, may protect or effectuate its judgment by enjoining proceedings in state courts that constitute relitigation of matters previously adjudged, and that a party with a favorable federal judgment need not rely on a plea of *res judicata* in the state court for the vindication of the rights

derived from the judgment. See 1A MOORE, FEDERAL PRACTICE 0.224 at 2614-16. See also *Cliett v. Hammonds*, 305 F.2d 565, 571-72 (5th Cir. 1962); *Jacksonville Blow Pipe Co. v. Reconstruction Finance Corporation*, 224 F.2d 394, 399-400 (5th Cir. 1957); *Williams v. Pacific Royalty Co.*, 247 F.2d 672, 675 (10th Cir. 1957); *American National Bank & Trust Company of Chicago v. Taussig*, 255 F.2d 765, 769-70 (7th Cir. 1958), *cert. den.*, 358 U.S. 883; *Berman v. Denver Tramway Corp.*, 197 F.2d 946, 950 (10th Cir. 1952); *Jackson v. Carter Oil Co.*, 179 F.2d 524, 525-27 (10th Cir. 1950), *cert. den.*, 340 U.S. 812.

3. In the exercise of sound equitable discretion, in order to prevent Lloyd George Kerns from drawing the state and federal courts into conflict, and in order to protect and effectuate the judgment of the three-judge district court, the district court properly granted the injunctive relief requested.

Section 2283 is, in essence, a codification of the doctrine of comity. *Harrison v. N.A.A.C.P.*, 360 U.S. 167, 176 (1959); *Darr v. Burford*, 339 U.S. 200, 204 (1950). Its purpose is "to prevent conflicts between federal and state courts." *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 225 (1957). Petitioner Kerns, by filing his complaint in the Supreme Court of Ohio to relitigate issues already adjudicated by the district court, attempted to create unseemly conflict between the two courts. He attempted to use the Supreme Court of Ohio as an instrumentality to defeat the judgment of the district court. He sought to circumvent the appeals of civil action number C71-1130.

Skolnick v. State Electoral Board of Illinois, 336 F. Supp. 839, 873 (N.D. Ill. 1971):

> "We believe that whoever would seek needlessly to create an unseemly conflict between the two courts would evidence indeed a total lack of understanding of the meaning and purposes sought to be served by the principle of comity."

As in *Skolnick, supra,* a section 2283 injunction in this case:

> "would effectuate the doctrine of comity by prohibiting these (persons) from drawing the federal and state judicial systems into needless conflict. It would prevent a confrontation which would threaten the integrity of this court's judgment, and it would avoid relitigation of a case fully adjudicated. Commerce Oil Refining Corp. v. Miner, 303 F. 2d 125, 127 (1st Cir. 1962)." *Ibid.*

The protection of the rights of the plaintiffs and of all citizens of Ohio similarly situated, as well as the due and effective administration of justice, required the avoidance of the unseemly conflict which Kerns sought to create to the detriment of the due and effective administration of justice.

The district court first acquired jurisdiction over the parties and subject matter of this action. Kerns consented to said jurisdiction, as is evidenced by his having filed notices of appeal. He now seeks:

> "to circumvent or frustrate that jurisdiction by provoking unseemly state-federal conflict over the same subject matter . . . In this posture, it seems important to sensitive areas of this kind that the Court having first acquired jurisdiction of the subject matter should proceed. . ."

Moss v. Burkhardt, 220 F. Supp. 149, 162 (W.D. Okla. 1963), *affirmed,* 378 U.S. 558.

C. 28 U.S.C. §2202 Expressly Authorized the District Court to Grant the Injunctive Relief Requested.

The Declaratory Judgment Act, 28 U.S.C. §2202 (1970), provides:

> "Further necessary or proper relief based on a declaratory judgment may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

This statute authorized the supplemental relief prayed for herein:

> "An entirely different situation is presented where the right to coercive relief arrives subsequent to the filing of the complaint, and thus would not have been previously asserted. There is here no reason to bar the plaintiff from seeking coercive remedy, and if the right asserted is germane to the declaration that has been issued, redress may be had by ancillary proceedings for supplemental and further relief under the provisions of 28 U.S.C. §2202. . . . Supplemental relief may therefore be in the form of a further declaration or a coercive judgment. . . . This is in accord with the general rule that courts have the power to administer supplemental relief to give effect to their judgments or decrees, and the declaratory judgment is no exception." 6A J. W. MOORE, FEDERAL PRACTICE, paragraph 57.10 at pages 2049-50 (2d ed. 1972).
>
> "A court may grant declaratory relief even though it chooses not to issue an injunction or mandamus. A declaratory judgment can then be used as a predicate to further relief, including an injunction." *Powell v. McCormack*, 395 U.S. 486, 499 (1969) (Citations omitted.)

For further cases in support of this proposition, see, e.g., *Teas v. Twentieth Century Fox Film Corporation*, 413 F.2d 1263, 1266-67 (5th Cir. 1969); *Vermont Structural Slate Co. v. Tatko Bros. Slate Co.*, 253 F.2d 29 (2d Cir. 1958); *Edward B. Marks Music Corp. v. Charles K. Harris Music Publishing Co., Inc.*, 255 F.2d 518, 522-23 (2d Cir. 1958), *cert. denied*, 358 U.S. 831; *National Hairdressers & Cosmetologists' Association, Inc. v. Philad Co.*, 41 F. Supp. 701, 708-09 (Del. 1941), *affirmed* in 129 F.2d 1020 (3d Cir. 1942).

CONCLUSION

For the reasons stated above, respondents say that a petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Ruling on Application for Three-Judge Court and Standing of Plaintiff

(Dated November 30, 1971)

Case No. C 71-1130 Y

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SAMUEL J. JORDON,
Plaintiff,

vs.

MAHONING COUNTY BOARD OF ELECTIONS, *et al.*,
Defendants.

RULING ON MOTION; RULING ON STANDING OF PLAINTIFF

The Defendants, John J. Gilligan, Joseph T. Ferguson, Anthony O. Calabrese, Sr. and Robert A. Manning, having questioned the standing of Plaintiff to sue, and the District Judge, considering said question along with the application for appointment of a three Judge Court, and having heard counsel on the issues raised, finds:

1. That the question of the constitutionality of the Ohio Reapportionment Plan is a proper matter for submission to a three Judge Court and the Chief Judge of the United States Court of Appeals for the Sixth Circuit has been requested to designate a panel to consider same.

2. That Plaintiff, a registered voter of the state of Ohio, has standing to sue.

/s/ FRANK J. BATTISTI, *Chief Judge,*
United States District Court

APPENDIX B

Class Action Order Finding That Plaintiff Represents All Registered Voters of the State of Ohio as a Class

(Dated November 30, 1971)

Case No. C 71-1130 Y

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SAMUEL J. JORDON,
Plaintiff,

vs.

MAHONING COUNTY BOARD OF ELECTIONS, *et al.*,
Defendants.

CLASS ACTION ORDER

At a session of said Court held in the United States Court House in the City of Cleveland on the 22nd day of November, A.D., 1971.

Present, Honorable Frank J. Battisti, Chief Judge, United States District Court.

The Court, having heard counsel for the parties on the question of whether this action can be maintained as a class action, after due deliberation:

The Court finds that this cause of action meets the prerequisite of Rule 23(a) of the Federal Rules of Civil Procedure, and that it comes within the provisions of Rule 23(b)(2) of the Federal Rules of Civil Procedure.

IT IS ORDERED, pursuant to Rule 23(c)(1) that the Plaintiff's action may be maintained and hereby is recognized as a class action, Rule 23(b)(2), on behalf of:

All registered voters of the state of Ohio.

The Court takes judicial notice of the fact that this lawsuit has received widespread, pervasive publicity through the mass news media, and that the ordinary news coverage in such mass news media of this order will effectively and adequately place all interested members of the class on notice of the pendency of the action, and its nature and purpose:

WHEREFORE, NOTICE IS HEREBY GIVEN that the Court has determined that the Plaintiff in this action represents all registered voters in the state of Ohio and that this action seeks to have declared as unconstitutional the Ohio Legislative Apportionment Plan.

Any member of the class described above who believes that his interest in the action is not or will not be fairly and adequately represented by the party Plaintiff, shall file his appearance in this cause and accompany the same with a statement of reasons for such belief. Such appearance must be filed with the Clerk of Court not later than 9:30 a.m., December 3rd, 1971. In the event appearances or interventions are filed on or before said December 3rd, 1971, the Court will conduct a hearing on same at 10:00 a.m. in the forenoon in its Court Room, United States Court House, Cleveland, Ohio, to consider such appearances and/or interventions and to outline procedures to be followed in these proceedings.

/s/ FRANK J. BATTISTI, *Chief Judge*
United States District Court

APPENDIX C

Memorandum Opinion and Order Directing Apportioning Persons to Present Constitutionally Sound Plan By December 21, 1971

(Filed December 3, 1971)

Case No. C 71-1130 Y

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SAMUEL J. JORDON,
Plaintiff,

vs.

MAHONING COUNTY BOARD OF ELECTIONS, *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

Before: CELEBREZZE, *Circuit Judge*; BATTISTI, *Chief Judge*, and WALINSKI, *District Judge*.

This action challenges the September 30, 1971, apportionment plan promulgated by the Ohio Apportionment Board, as a denial of equal protection. Specifically challenged under the plan are:

1. The 1.950% total deviation from the mean population for the state House of Representatives districts and the 1.510% total deviation from the mean population for state senate districts;

2. The plan's non-compliance with the Ohio Constitution Article XI, §§ 8, 10(c) and 11, providing that frac-

tional portions of a house or senate district within one county must be part of only one district in an adjoining county; and

3. The plan's failure to include, *inter alla*, Zanesville City, Bowling Green City, and the plaintiff's ward in Youngstown in any house or senate districts.

On the face of his complaint, plaintiff raises a claim which clearly indicates a denial of equal protection over which this three-judge district court has jurisdiction. See *Baker v. Carr*, 369 U.S. 186, 195-204 (1962). The parties have stipulated and conceded that the plan in its present form is unconstitutional on its face and they have also stipulated as to the truth of the above allegations. A copy of this stipulation is attached to and incorporated into this Opinion.

Although the Ohio Constitution, Article XI, § 13 provides that . . . "the Supreme Court of Ohio shall have exclusive, original jurisdiction in all cases arising under this Article," the Supremacy Clause of Article VI of the United States Constitution prevents a state constitution from limiting the jurisdiction of federal courts.

Subsequent to the filing of the instant case, a similar suit was filed in the Ohio Supreme Court, *Norris v. Gilligan, et al.*, No. 71-748.

Being aware that nominating petitions must be filed in less than two months, this Court concludes that the abstention doctrine is inappropriate here. *Cf. Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). It is clear that the apportionment plan is unconstitutional on its face and no conceivable ruling by the Ohio Supreme Court could alter this situation. *Turner v. City of Memphis*, 369 U.S. 350 (1962).

Numerous cases have consistently recognized the propriety and advisability of allowing the state legislature or an Apportionment Board an opportunity to reapportion its state within guidelines propounded by the federal courts. See, e.g. *Nolan v. Rhodes*, 251 F. Supp. 584, 585-86 (S.D. Ohio, 1965); *Wells v. Rockefeller*, 281 F. Supp. 821, 822-23 (S.D. N.Y. 1968), *rev'd on other grounds*, 394 U.S. 542 (1968). In the instant case the Apportionment Board is the state body responsible for reapportionment.

It is clear that the plan as presently constituted is unconstitutional in that if the plan were enacted in its present form it would be violative of the one man, one vote requirement; *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 374 U.S. 802 (1964), because of the omission of certain cities and wards in Ohio. This Court makes no finding on the other issues raised in the complaint. However, on resubmission population variances must be justifiable and unavoidable. Therefore, this Court directs that the plan be resubmitted to the Apportionment Board and that they present a constitutionally sound plan to this panel no later than December 21, 1971. This Court shall retain jurisdiction until such time as a proper reapportionment plan is approved by it.

Since this case is a properly constituted class action to which no objection has been filed, all members of the class are prohibited from litigating any issues raised here in any other court during the pendency of this action.

It is so ordered.

/s/ ANTHONY J. CELEBREZZE
Circuit Judge

/s/ FRANK J. BATTISTI
Chief Judge

/s/ NICHOLAS J. WALINSKI
District Judge

APPENDIX D

Memorandum Opinion and Order Finding Alan E. Norris and John McElroy in Contempt Entered December 21, 1971

(Filed December 21, 1971)

Case No. C 71-1130 Y

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SAMUEL J. JORDON,
Plaintiff,

vs.

MAHONING COUNTY BOARD OF ELECTIONS, *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

BATTISTI, *C. J.*

This cause came before this Court on an order to show cause why Alan Norris and John McElroy should not be held in contempt of Court.

Whether what was done on December 9, 1971, was in fact a hindrance with the processes of this Court and its orders, and whether it was done wilfully and in bad faith may in the opinion of counsel for Norris and McElroy and themselves be an open question. It clearly was not. It is also clear that the audacity of these persons (Norris and McElroy) this morning is nothing less than astonishing.

In the face of the unanimous opinion of the three-judge court and the arguments of counsel this morning, it is almost beyond belief that these parties—McElroy and Norris—have asserted that they may continue to proceed in the Supreme Court of Ohio. Their position in this regard reflects on their contempt for this Court and its orders and casts a dark shadow over the innocence and good faith they claim in proceeding in the Supreme Court of Ohio on December 9th.

The conduct of McElroy and Norris on December 9th and their assertion today that they may proceed further in the Supreme Court of Ohio is unbecoming of officers and attorneys authorized to practice before this Court. It is clear that they have not and are not now acting in good faith; and that, on the contrary, their conduct was and is in direct violation and dereliction of valid orders and authority of this Court today and the three-judge court.

The institution of disbarment proceedings or imprisonment will not be considered at this time, but it is necessary to impose some punishment for the obvious contempt committed by Messrs. Norris and McElroy.

Mr. Norris's role up to this date has been somewhat nominal, and his conduct in following the advice of counsel up to this date militates in favor of considerable mitigation. Thus, he is fined $100.00.

Mr. McElroy is the principal and most culpable for the conduct undertaken out of Court and in Court this morning. He is fined in the amount of $5000.00.

The fines are payable within thirty days of this date.

Alan Norris and John McElroy are prohibited from proceeding, except by way of dismissal, on any issues raised before the three-judge court in any other court, including the Supreme Court of Ohio or any United States District Court until the three-judge panel divests itself of jurisdiction.

Hopefully, by this time it is understood that the prohibition covers all issues included in the complaint filed in the Supreme Court of Ohio in Case No. 71-748 in that the complaint in that case raised issues under advisement by the three-judge court.

It is so ordered.

/s/ FRANK J. BATTISTI, *Chief Judge*

APPENDIX E

Order Denying Motion of Alan R. Norris to Intervene

(Filed December 22, 1971)

Case No. C 71-1130 Y

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SAMUEL J. JORDON,
Plaintiff,

vs.

MAHONING COUNTY BOARD OF ELECTIONS, *et al*
Defendants.

ORDER

Before: CELEBREZZE, *Circuit Judge*; BATTISTI, *District Chief Judge*; WALINSKI, *District Judge.*

Upon consideration,

The motion of Alan E. Norris to intervene as par plaintiff is hereby denied.

It is so ordered.

/s/ ANTHONY J. CELEBREZZE
Circuit Judge

/s/ FRANK J. BATTISTI
Chief Judge

/s/ NICHOLAS J. WALINSKI
District Judge

APPENDIX F

Order of the Court That the Finding of Contempt Against Alan E. Norris and John McElroy Should Not Be Set Aside

(Filed January 20, 1972)

Case No. C 71-1130 Y

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SAMUEL J. JORDON,
Plaintiff,

vs.

MAHONING COUNTY BOARD OF ELECTIONS, *et al.*,
Defendants.

ORDER

Before CELEBREZZE, *Circuit Judge;* BATTISTI, *Chief Judge,* and WALINSKI, *District Judge.*

This cause came on to be heard on the joint motion of John M. McElroy and Alan E. Norris, filed December 20, 1971, requesting that this Court's order of December 3, 1971, in the above action be vacated and that the December 13, 1971, order of the Honorable Frank J. Battisti adjudging the movants to be in contempt and fining them $5000.00 and $100.00, respectively, be reviewed by the full panel of this Court. By an order of this Court filed December 22, 1971, all matters passed upon by the Honorable Frank J. Battisti were ratified by this panel, save and except the

contempt citations against Messrs. McElroy and Norris, which were taken under advisement. By a joint motion filed January 4, 1972, with supporting affidavits, Messrs. McElroy and Norris requested that this panel vacate the December 13, 1971, order of the Honorable Frank J. Battisti adjudging them to be in contempt.

Having fully reviewed the relevant facts surrounding the December 13th contempt order and the affidavits, wherein Messrs. McElroy and Norris acknowledge that their conduct was in direct derogation of this Court's order of December 3, 1971, we conclude that the finding of contempt shall not be set aside as to either of the parties. We do not believe that the contemptuous conduct of the parties can be excused under their assertedly erroneous reading of the Rule 23, F.R.Civ.P., notice requirements and their failure to ascertain the scope of this Court's December 3, 1971, order, after it was fully explained to them by the Honorable Frank J. Battisti at the December 13, 1971, hearing.

In light of all the circumstances in this matter, we reduce John McElroy's fine to $500.00; and Alan E. Norris' fine remains at $100.00; payable on or before January 21, 1972.

It is so ordered.

/s/ ANTHONY J. CELEBREZZE
Circuit Judge

/s/ FRANK J. BATTISTI
Chief Judge

/s/ NICHOLAS J. WALINSKI
District Judge

APPENDIX G

Final Order Entered March 13, 1972 "Adopting" Apportionment Plan for Remainder of Decennium

No. C 71-1130 Y

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SAMUEL J. JORDAN, *et al.*,
Plaintiffs,

vs.

MAHONING COUNTY BOARD OF ELECTIONS, *et al.*,
Defendants.

ORDER

Before CELEBREZZE, *Circuit Judge*; BATTISTI, *Chief Judge*; and WALINSKI, *District Judge*.

Pursuant to the December 22, 1971, Order of this Court, the plaintiffs were granted leave to examine the reapportionment plan and file objections thereto. The plaintiffs have filed their report containing no objections. Therefore, the reapportionment plan is adopted; and, accordingly, there is no compelling reason to retain jurisdiction.

It is so ordered.

ANTHONY J. CELEBREZZE
Circuit Judge

FRANK J. BATTISTI
Chief Judge

NICHOLAS J. WALINSKI
District Judge

APPENDIX H

SUPREME COURT OF THE UNITED STATES
Office of the Clerk Washington, D. C. 20543

Oct. 10, 1972

John M. McElroy, Esq.
Topper, Alloway, Goodman, DeLeone & Duffey
Suite 515 Huntington Bank Bldg.
17 South High St.
Columbus, Ohio 32114

RE: *Norris, et al. v. Jordan, et al.*, No. 71-1109;
Norris, et al. v. Jordan, et al., No. 71-1439

Dear Sir:

The Court today entered the following order in the above-entitled cases:

The motion to defer consideration is denied. The appeals are dismissed for want of jurisdiction.

Very truly yours,

MICHAEL RODAK, JR., *Clerk*
By /s/ HELEN TAYLOR
HELEN TAYLOR (MRS.)
Assistant Clerk

Nathaniel R. Jones, General Counsel
NAACP Special Contribution Fund
10th Floor, 1790 Broadway
New York, N.Y. 10019

John F. Ray, Jr., Esq.
Matia, Isaac, Ray & Elder
Suite 200-75 Public Sq.
Cleveland, Ohio 44113

Dennis Haines, Esq.
Asst. Prosecuting Attorney
Mahoning County Courthouse
Youngstown, Ohio 44503

APPENDIX I

SUPREME COURT OF THE UNITED STATES
Office of the Clerk Washington, D. C. 20543

Nov. 20, 1972

John M. McElroy, Esq.
Topper, Alloway, Goodman, DeLeone & Duffey
Suite 515 Huntington Bank Bldg.
17 South High St.
Columbus, Ohio 32114

RE: *Norris, et al. v. Jordan, et al.* 71-1109; *Norris, et al. v. Jordan, et al.*, 71-1439 (U.S.D.C., ND Ohio # 71-1130y)

Dear Sir:

The Court today entered the following order in the above-entitled cases:

The motion of appellant for specification of grounds for finding want of jurisdiction is denied. The petition for rehearing of appellant Kerne is denied.

Very truly yours,
MICHAEL RODAK, JR., *Clerk*
By /s/ HELEN TAYLOR
HELEN TAYLOR (MRS.)
Assistant Clerk

Nathaniel R. Jones, Gen. Counsel
NAACP Special Contribution Fund
10th Flr., 1790 Broadway
N.Y., N.Y. 10019

John F. Ray, Jr., Esq.
Matia, Isaac, Ray, Elder
Suite 200-75 Public Sq.
Cleveland, Ohio 44113

Dennis Haines, Esq.
Asst. Pros. Atty.
Mahoning County Courthouse
Youngstown, Ohio 44503

Clerk, U. S. District Court
for the Northern Dist. of Ohio
U.S. Courthouse
Cleveland, Ohio 44114

APPENDIX

Order Filed April 13, 1973

Nos. 73-1003, 73-1004 73-1005

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SAMUEL J. JORDON,
Plaintiff-Appellee,

ALAN E. NORRIS,
Appellant,

v.

MAHONING COUNTY BOARD OF ELECTIONS, *et al.*,
Defendants-Appellees.

ORDER

Before: PECK, MILLER and LIVELY, *Circuit Judges.*

This matter having come on to be considered on the motion of the defendants-appellees to reconsider their previously denied motion to dismiss the appeal, and on the record on appeal and on the briefs and oral arguments of counsel for the parties, and the Court being fully advised in the premises having concluded that the appeal was from a decision of a statutory three-judge district court and that this Court is therefore without jurisdiction (*Lee v. Roseberry*, 200 F.2d 155 (6th Cir. 1952), and having therefore further concluded that the motion to dismiss should have been granted,

IT IS ORDERED that this appeal be and it hereby is dismissed.

ENTERED BY ORDER OF THE COURT

/s/ JAMES F. HIGGINS
Clerk

APPENDIX K

Order Directing Lloyd George Kerns to Dismiss Original Action Filed in the Supreme Court of Ohio (Dated April 25, 1973)

Civil Action No. C71-1130

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SAMUEL J. JORDAN, *et al.*,
Plaintiffs,

vs.

MAHONING COUNTY BOARD OF ELECTIONS, *et al.*,
Defendants.

TEMPORARY RESTRAINING ORDER

This cause came on to be heard on motion of the Apportioning Persons of the State of Ohio for a Supplemental Order in this cause, to-wit: a temporary restraining order pursuant to Rule 65(b), Federal Rules of Civil Procedure, and upon the affidavit of James A. Laurenson, attached thereto, and the Court being satisfied that all parties received sufficient notification, and having heard counsel for the moving parties and the respondent, this Court finds:

That the Complaint in Civil Action No. C71-1130 challenged the original reapportionment plan as defective under both the state *and* federal constitutions, and prayed for injunctions requiring the movants to establish a plan

that satisfied the requirements of the state *and* federal constitutions; that on December 3, 1971, this Court ordered the movants to establish a constitutionally sound plan, noting, as grounds therefor, state and federal constitutional defects in the original one; that this Court, on December 21, 1971, held Messrs. Norris and McElroy in contempt of its December 3, 1971 Order for attempting to litigate almost the identical issues raised in Case No. 73-270 in an original action brought by them in the Supreme Court of Ohio, and stated that "that case raised issues under advisement by the three-judge court"; that on December 22, 1971, this Court adopted the movants' revised plan for the 1972 election, but allowed 60 days for the filing of any state or federal constitutional objections, providing all parties adequate opportunity to raise any state *or* federal constitutional challenges; that no objections were filed and this Court entered a Final Order on March 13, 1972, adopting the plan for the remainder of the decennium; that the Complaint in Case No. 73-270 raises similar issues to the Complaint filed in the Ohio Supreme Court in 1971, *i.e.*, that the plan violates the state *and* federal constitutions; that the Complaint in Case No. 73-270 requests the Supreme Court of Ohio to set aside a plan that was adopted by Order of this Court for 1972 and for the decennium, and to set aside the 1972 elections that were ordered by this Court; that this Temporary Restraining Order is necessary to prevent Messrs. Kerns and McElroy from drawing the state and federal judicial systems into conflict, to prevent relitigation of this cause in another forum, and that this Order is authorized pursuant to 28 U.S.C. §§ 1651 and 2283 (1970); that, unless this Temporary Restraining Order is granted, the moving parties shall be required to move or plead in the Supreme Court of Ohio on or before May 1, 1973, in violation of the Order of this Court entered De-

cember 3, 1971; that, unless this Temporary Restraining Order is granted, the moving parties and the state and federal judicial systems will suffer grave and irreparable harm and damage, for which there is no adequate remedy at law.

Now, Therefore, it is Ordered that Lloyd George Kerns, his agents, employees, and attorneys, and all persons acting by, under, for, or with him are enjoined to withdraw, dismiss, and terminate, on or before April 27, 1973, an original action filed in the Supreme Court of Ohio on March 30, 1973, captioned *Lloyd George Kerns vs. John J. Gilligan, et al.*, Case No. 73-270, and that all parties to, and class members in, this cause be, and they hereby are, enjoined from proceeding further in Case No. 73-270 in the Supreme Court of Ohio or commencing or proceeding in any other action in any court designed to or which will have the effect of interfering with any order of this Court until further order of this Court.

It is further ordered that the hearing on the moving parties' motions under Rule 65(a), Federal Rules of Civil Procedure shall be held on May 3, 1973, at 10:00 a.m., or as soon thereafter as the Court's docket permits.

It is further ordered that notice by telephone of this order on counsel for all parties shall be deemed sufficient notice.

Issued at 12:23 p.m., April 25, 1973.

No bond is required.

/s/ Frank J. Battisti

APPENDIX L

Order Filed April 30, 1973

Nos. 73-1003, 73-1004, 73-1005

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SAMUEL J. JORDAN,
Plaintiff-Appellee,

ALAN E. NORRIS,
Appellant,

v.

MAHONING COUNTY BOARD OF ELECTIONS, *et al.*,
Defendants-Appellees.

ORDER

Before: PECK, MILLER and LIVELY, *Circuit Judges.*

Appellant having filed a petition for rehearing with this Court, and this Court having considered said petition and being duly advised in the premises,

IT IS ORDERED that the petition for rehearing be, and it is, hereby denied.

ENTERED BY ORDER OF THE COURT
/s/ JAMES A. HIGGINS
Clerk

APPENDIX M

Memorandum Opinion and Order Permanently Enjoining All Parties from Litigating Any Matters which Were or Could Have Been Raised in Civil Action No. C71-1130

(Dated June 11, 1973)

No. C 71-1130

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SAMUEL J. JORDAN, *et al.*,
Plaintiffs,

v.

MAHONING COUNTY BOARD OF ELECTIONS, *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

BATTISTI, *C. J.*

Plaintiffs have requested supplemental orders to protect the judgment already rendered in this case. Specifically, plaintiffs request that all persons included in the plaintiffs' class action be enjoined from relitigating the issues already decided, since it is nothing less than a frivolous effort to prevent this case from ever reaching a final resolution. The relief sought is clearly within the equitable jurisdiction of the Court to effectuate its judgments. *Dugas v. American Surety Co.*, 300 US 414, 428-29 (1937); *Root v. Woolworth*, 150 US 401, 411-12 (1893); *Hamilton v. Nakal*, 452 F.2d 152, 157 (9th Cir. 1972). Therefore, an appropriate injunction is set forth at the conclusion of this opinion.

The relevant facts of this case are clear from the record. On November 15, 1971, a complaint was filed challenging the apportionment plan then in effect for the election of members of the Ohio General Assembly. On November 30, 1971, an order determining the class which plaintiff represented was signed. The state apportionment board was then ordered to submit a new plan no later than December 21, 1971. This was done, and plaintiff filed no objection to the new plan. Final judgment approving this plan was subsequently entered on March 13, 1972.

The respondent herein, Lloyd George Kerns, now contends that he was not within the boundaries defined by the order of class determination and, thus, should not be considered bound by the final judgment. It must be noted at the outset that Mr. Kerns is at best stressing a technicality, for nowhere in his memoranda does he allege lack of notice that this lawsuit was pending. On the contrary, the only inference to be drawn from the facts presented is that he knew of the proceedings throughout[1] and

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1) It should be noted in this regard that since this class action was not brought pursuant to F.R.Civ.P. 23(b)(3), it is not subject to the individual notice requirement and "opt-out" provision of Rule 23(c). Rather, it sought equitable relief to redistrict the state in accordance with constitutional requirements. Such relief clearly falls within the terms of Rule 23(b)(1) and (2), and personalized notice directed to individual class members is not strictly required in all such cases. *Yaffe v. Powers*, 454 F.2d 1362 (1st Cir. 1972); *Johnson v. City of Baton Rouge*, 50 FRD 295 (D. La 1970). The notice to be utilized under these circumstances is within the sound discretion of the Court, and mere notice by publication will usually suffice. *Lopez v. Wyman*, 329 F. Supp. 483, *aff'd.*, 404 US 1055 (1972). In the class determination order, judicial notice was taken of the fact that the redistricting issue had already received widespread publicity in the news media throughout the state. Additional notice was entirely unnecessary. For this reason, Mr. Kerns cannot sustain a contention that binding him by the prior proceedings is violative of Due Process for lack of adequate notice, even were he to allege an absence of actual notice, see *Lopez v. Wyman, supra*, at 486, which, as noted above, he does not.

may have actually participated therein. Any attempt by respondent to negate this inference would indeed strain credulity. He is a former state legislator and remains quite active in politics. In fact, his former lawyer, who participated throughout this lawsuit and is a partner of his current lawyer, testified that his political party had solicited respondent for the express purpose of continuing the litigation. Furthermore, respondent filed notices of appeal on January 3 and 24, 1972, which would make it impossible for him to seriously contend that he first learned of this action after the final judgment binding all qualified voters was issued on March 13, 1972.

Therefore, the Court will proceed to analyze the technicality which is the essence of Mr. Kerns' argument. He points to the fact that the class determination order referred only to "registered voters," a group to which he does not belong. Rather, he is a "qualified voter," a term applied to those persons eligible to vote without registration under special statutory provisions applicable only to residents of municipalities of less than sixteen thousand people. Section 3503.06 O.R.C. Thus, respondent asserts, the judgment cannot be construed as broadening the class determination order, even though it incorporates language[2] to include all qualified voters, for such a determination would violate his right to Due Process by depriving him of his day in court. Under the facts of this case, this argument is so totally lacking in substance that it casts some doubt on the sincerity of counsel, who is a skillful and learned practitioner in federal court.

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2) This language was incorporated from a stipulation to which Mr. Kerns was not a party.

Respondent's argument depends entirely upon his overly restrictive interpretation of Rule 23(c)(1).[3] He reads this rule to require that amendments to class determination orders must *always* be made prior to judgment; and, although apparently conceding that he is within the literal language of the judgment, respondent contends that such inclusion is in effect an amendment to the class determination order and, therefore, a violation of Rule 23(c)(1). This interpretation, however, fails to take into account the applicable provisions of Rule 60(a).[4]

It is undisputed, as outlined above, that the class determination order referred only to "registered voters," although the complaint recites that the action was brought ". . . on behalf of all persons throughout the State of Ohio qualified to vote for candidates for membership in the Ohio General Assembly," and the final judgment was made applicable to the latter group. No reason was given by the Court for distinguishing between registered and qualified voters when the class determination order was signed, nor does respondent allege now that any valid reason existed for making such a distinction. Clearly, the interest of these two groups is identical—namely, to effectuate the "one-man, one-vote" principle set forth in *Reynolds v. Sims*, 377 US 533 (1964). As such, the omission of either group from any order herein would of necessity be inadvertent, and not indicative of the true intention of the

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3) That rule provides in pertinent part: "An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

4) This rule provides that: "Clerical mistakes in judgments, orders or other parts of the record and *errors therein arising from oversight or omission may be corrected by the court at any time.* . . ." (Emphasis added.) For a discussion of the meaning of this language, see 6A Moore's Federal Practice at 4065-66; 3 Barron and Holtzoff, Federal Practice and Procedure, § 1324, p. 398-99 (Wright ed 1958).

Court[5] as understood by the parties. It would, therefore, be correctable *at any time* by an amendment pursuant to Rule 60(a).

As was stated in *Matthies v. Railroad Retirement Board*, 341 F.2d 243 (8th Cir. 1965) at 248:

> "All courts have the inherent power to enter orders *nunc pro tunc* to show that a thing was done at one time which ought to have been shown at that time. It is an entry now for something previously done so that the record may actually speak the truth."

There can be little doubt from the record and subject matter of this case as to the intended scope of the class. Thus, to amend the class determination order herein would be merely to "recognize only what was understood, what was intended, what was agreed, and what the court itself had accepted as the resolution of the litigation then pending. No prejudice could possibly result from what the court did." *Pattiz v. Schwartz*, 386 F.2d 300 (8th Cir. 1968) (Blackmun, J.). Accordingly, to correct a technical imperfection in the record, the class determination order signed on November 30, 1971, is hereby amended by deleting the words "all registered voters of the State of Ohio" and inserting in their place the following:

> "All persons throughout the State of Ohio who are qualified to vote for candidates for membership in the Ohio General Assembly."

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5) In paragraph 4 of respondent's Second Memorandum in these supplemental proceedings, he admits that the Court was probably operating under a mistaken belief as to the actual scope of the class determination order. He further states that this mistake persisted as late as April 11, 1972, after final judgment, when the Court denied Mr. Kerns' motion for clarification. This argument confirms, rather than negates, the propriety of applying Rule 60(a) to the erroneous order, as will be discussed later in this opinion.

In making the modification to correlate the class determination order with the final judgment, the Court emphasizes that respondent has made no attempt to show that the correction will be prejudicial to him in any way. As noted previously, he appears to have participated substantially in the initial proceedings. This participation includes an appeal of the decision of the three-judge court to the Supreme Court, and even to the Sixth Circuit Court of Appeals, all before the entry of final judgment. Furthermore, it would seem that a claim of prejudice, to be sustained, would require at a minimum a showing that:

1. The aggrieved party's interest was different from the putative class representative, or

2. The representation of the class in the initial proceeding was inadequate.[6]

With respect to these elements, respondent Kerns does not even allege that his interest was different from the representative plaintiff. In fact, in the briefs he filed in the Supreme Court and the Court of Appeals, he alleged that his interests were "identical with those of members of the class represented by the plaintiff above named. . . ." Mr. Kerns did, however, in an amended notice of appeal assert that he believed the representation of the class to be inadequate. He did not specify any basis for his belief. However, it may be inferred from his memoranda filed in these supplemental proceedings that his dissatisfaction resulted only from the political makeup of the apportioned districts, and not from a violation of any cognizable constitutional right. He does not dispute that the

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6) These elements would also have to be shown as a prerequisite for respondent's claim that inadequate time was permitted in which to file objections to the class determination order.

original apportionment was unconstitutional[7] or that the final plan accepted by plaintiff satisfied constitutional mandates. Thus, his assertion as to the adequacy of representation does not even rise to the level of a colorable claim.

It is, therefore, clear that respondent's argument under the facts of this case amounts to an exercise in frivolity, or at best to a hypothetical question as to whether one may ever contest a modification of class boundaries which is made either simultaneously with, or subsequent to, the entry of judgment in this type of class action. While this might prove to be an interesting subject for general discussion, it requires no further response in this case. Since respondent is properly a member of the class in case number C 71-1130, he is bound by the judgment in that action.

To summarize, counsel for respondent has asked this Court to hold that the inclusion of Mr. Kerns in the final class judgment amounts to a violation of his Due Process rights. This request is made without a demonstration that such inclusion would be prejudicial, due to either a lack of appropriate notice, an inadequacy of representation, or a dissimilarity of interests between respondent and the plaintiff in the initial proceeding. Clearly, what we have here is an effort, and a rather shabby one at that, to utilize a solicited plaintiff to reopen a case already litigated, decided, and appealed. Such activity cannot be too strongly condemned. These subsequent proceedings are not a legitimate attempt to vindicate basic rights, as counsel would have us believe, but rather to use the Court as a political forum. Needless to say, such conduct borders dangerously on the realms of misrepresentation and contempt. The

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7) This approach would have been somewhat difficult, since the unconstitutionality of the original plan was conceded at the outset by all, including counsel for the State of Ohio.

Court, however, unlike Mr. Kerns, is not inclined to further prolong a case which should have ended long ago. Thus, an injunction against further proceedings will be the only action taken at this time. Accordingly, all parties to, and class members in, Civil Action No. C 71-1130 are hereby permanently restrained and enjoined from litigating any matters which were, or could have been, raised in Civil Action No. C 71-1130, in any state or federal court (except as may be provided by law for the appeal of any order in Civil Action No. C 71-1130 to the United States Court of Appeals or to the United States Supreme Court), and further that all such persons are permanently restrained and enjoined from filing any new actions affecting any matters which were, or could have been, raised herein and otherwise from taking any actions designed to or which will have the effect of interfering with the carrying out of the orders of this Court; and all such persons are permanently restrained and enjoined from taking any legal action (except as may be provided by law for the appeal of any order of this Court in Civil Action No. C 71-1130 to the United States Court of Appeals or to the United States Supreme Court) designed to or which will have the effect of impeding or interfering with the carrying out of any election pursuant to the plan of apportionment approved and adopted by the orders of this Court entered December 22, 1971, and March 13, 1972. Furthermore, the defendant Ted W. Brown, as Secretary of State and chief election officer of the State of Ohio, his successor or successors, and all those acting by and under his authority, are hereby ordered and directed to accept filings and conduct elections only in accordance with the provisions of the March 13, 1972, order of this Court adopting a legislative plan of apportionment so long as it remains in effect, or in conformity with the election statutes of the State of Ohio which are not inconsistent therewith. The said Secretary

of State, his successor or successors, and all those acting by and under his authority are enjoined from accepting filings, or declaring the results of any election, otherwise than in conformity with this order.

IT IS SO ORDERED.

/s/ FRANK J. BATTISTI
Chief Judge

APPENDIX N

Order Filed November 9, 1973

No. 73-1972

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SAMUEL J. JORDON,
Plaintiff-Appellee,

v.

LLOYD GEORGE KERNS,
Appellant,

v.

MAHONING COUNTY BOARD OF ELECTIONS, *et al.*,
Defendants-Appellees.

ORDER

Before: PECK, MILLER and LIVELY, *Circuit Judges.*

This cause having come on to be considered on the motion of certain of the defendants-appellees to dismiss the appeal, and the Court being fully advised in the prem-

ises having concluded for the reasons set forth in the Memorandum Opinion and Order filed by Chief Judge Frank J. Battisti that it is manifest that the questions on which the decision of the court depends are so unsubstantial as not to need further argument (Rule 8, Rules of the Sixth Circuit), and that therefore the said Motion to Dismiss is well taken,

IT IS ORDERED that this appeal be and it hereby is dismissed. It is further ORDERED that the motion of the appellant for an expedited appeal be and it hereby is denied as moot.

ENTERED BY ORDER OF THE COURT
/s/ JAMES A. HIGGINS
Clerk

APPENDIX O

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

Dec. 3, 1973

William R. Holland, Esq.
Bierce, Holland, Manning, Metz & Wilson
Suite 319
277 South Broadway St.
Akron, Ohio 44308

RE: *Manning v. Gilligan, Governor of Ohio, et al* 73-453

Dear Sir:

The Court today entered the following order in the above-entitled case:

The appeal is dismissed for want of a substantial federal question.

Very truly yours,

MICHAEL RODAK, JR., *Clerk*
By /s/ HELEN TAYLOR
HELEN TAYLOR, (MRS.)
Assistant Clerk

cc: Nathaniel R. Jones, Esq.
10th Fl., 1790 Broadway
NYC 10019

John F. Ray, Jr., Esq.
1763 Illuminating Bldg
55 Public Square
Cleveland, Ohio 44113

APPENDIX P

Order Entered April 11, 1973, Holding that Lloyd George Kerns Is a Member of the Class of Plaintiffs

No. C 71-1130Y

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SAMUEL J. JORDAN, *et al.*,
Plaintiffs,

v.

MAHONING COUNTY BOARD OF ELECTIONS, *et al.*,
Defendants.

Before: CELEBREZZE, *Circuit Judge*, BATTISTI, *Chief Judge;* and WALINSKI, *District Judge.*

Alan E. Norris, Jacob A. Shawan and Lloyd George Kerns have moved this three-judge court for clarification of its final order of March 13, 1972. These men are members of the class represented by the attorneys for Samuel J. Jordan. No intervention has been granted in the above-entitled cause. Therefore, these movants have no standing to raise this motion for clarification.

In addition, the motion is not well taken. In the opinion of December 3, 1971, the reapportionment plan submitted was found to be violative of the requirements of *Baker v. Carr,* 369 U.S. 186 (1962). The reapportionment board was ordered to produce a "constitutionally sound

plan" by December 31, 1971. This was done. At no time did this panel ever ask, request, or order the reapportionment board to correct the deficiencies in the originally submitted plan. The motion to clarify is overruled.

It is so ordered.

/s/ ANTHONY J. CELEBREZZE
Circuit Judge

/s/ FRANK J. BATTISTI
Chief Judge

/s/ NICHOLAS J. WALINSKI
District Judge

[Filed April 11, 1972]

REPLY

BRIEF

JAN 14 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. A-583

LLOYD GEORGE KERNS,

Petitioner,

v.

SAMUEL J. JORDON, Mahoning County Board of Elections, JOHN J. GILLIGAN, Governor of the State of Ohio, JOSEPH T. FERGUSON, Auditor of the State of Ohio, TED W. BROWN, Secretary of State of the State of Ohio, ANTHONY O. CALABRESE, SR., Member, Ohio Senate, and ROBERT A. MANNING, Member, Ohio House of Representatives,

Respondents.

RESPONSE OF SAMUEL J. JORDON, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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Petitioner,

v.

SAMUEL J. JORDON, Mahoning County Board of Elections, JOHN J. GILLIGAN, Governor of the State of Ohio, JOSEPH T. FERGUSON, Auditor of the State of Ohio, TED W. BROWN, Secretary of State of the State of Ohio, ANTHONY O. CALABRESE, SR., Member, Ohio Senate, and ROBERT A. MANNING, Member, Ohio House of Representatives,

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RESPONSE OF SAMUEL J. JORDON, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Counter Statement of the Question Presented

May a Federal District Court enjoin a member of a class from relitigating in a state court, any matter which was or could have been raised in the Federal Court proceeding?

Counter Statement of the Case

Respondent, Samuel J. Jordon, filed his complaint in the United States District Court for the Northern District of

Ohio, on November 15, 1971, alleging that the published plan for re-apportionment approved by the State's apportioning persons who were named as defendants, and published according to law, was violative of his rights under the 14th and 15th Amendment of the United States Constitution and of Article V and Article XI of the Ohio Constitution. Same being numbered on the docket of said court as C 71-1130 (RA 1).[1]

On November 30, 1971, by separate orders, the Court declared the matter to be appropriate for consideration by a three-judge court; that the Respondent had standing to sue; and that the matter should be litigated as a class action under Rule 23 (b)(2) of the Federal Rules of Civil Procedure (RA 5).

A hearing was scheduled for December 3, 1971, on the allegations of Respondent. At said hearing, the state apportioning officers, who were all duly elected and functioning state officials, were represented, in keeping with Ohio Statutes, by the State Attorney General's office. The 3-judge panel unanimously found the plan for re-apportionment to be unconstitutional. The panel ordered the apportioning officials to submit to the Court a constitutionally-valid plan no later than December 21, 1971 (RA 6).

In conformity with the order, a plan was subsequently submitted to the Court. A hearing was held before the three-judge panel on December 22, 1971, with Circuit Judge Anthony J. Celebrezze, presiding, testimony taken, at the conclusion of which the Court unanimously held the plan to be constitutionally valid. However, the Court deferred

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[1] References to respondent's appendices are designated as RA, while references to Petitioner's Appendices are designated A, B, C, etc.

a final order on the plan for a period of 60 days to afford Respondent's counsel an opportunity to study it in greater detail (RA 7).

During said sixty day period, Petitioner, a member of Respondent's class, did not raise any issues or questions regarding the plan, with counsel for the class, or with the Court.

Accordingly, on March 2, 1972, counsel for Respondent advised the Court that they had completed their examination of the plan for re-apportionment and had no additional objections to the plan beyond those raised at the hearing on December 22, 1971. This report was acknowledged in an order of the Court on March 13, 1972 (RA 3).

Petitioner filed two separate appeals directly to the Supreme Court of the United States, same being numbered on the docket of the Supreme Court of the United States as 71-1109 and 71-1439. The Supreme Court dismissed both appeals, on the motion of the Respondent, for want of jurisdiction.

In the meantime, Petitioner also filed an appeal to the Circuit Court of Appeals for the Sixth Circuit, same being numbered on the docket of said Court as 71-1130. On December 29, 1972, Petitioner dismissed this appeal.

On March 30, 1973, Petitioner filed an original action in the Supreme Court of Ohio, same being numbered on the docket of said Court as 73-270. Petitioner, in filing that action with its allegations in the Supreme Court of Ohio, was attempting to relitigate matters already litigated in the District Court, Circuit Court of Appeals and Supreme Court of the United States.

On April 25, 1973, Petitioner, by order of the District Court, was directed to dismiss his action in the Ohio Su-

preme Court and enjoined from proceeding with said case. On June 11, 1973, the District Court enjoined Petitioner from litigating any matter which was or could have been raised in Civil Action C 71-1130 (RA 1).

Petitioner, on July 6, 1973, appealed the June 11th, 1973, order to the Circuit Court of Appeals for the Sixth Circuit, same being numbered on the docket of said Court as 73-1972. Said Court on November 9, 1973, dismissed said appeal pursuant to Rule 8 on the grounds that said appeal was so unsubstantial as not to need further argument (Appendix A).

Petitioner now seeks to invoke the jurisdiction of this Court under 28 U.S.C. 1254 (1).

Reasons for Denying the Writ

Petitioner contends that a Federal District Court is barred from issuing an injunction by virtue of the provisions of 28 U.S.C. 2283, the Anti-Injunction Statute. Erroneously, he describes the District Court's order as operating upon and against the State Court. This is obviously and demonstrably untrue. The Petitioner, not the Court, was enjoined.

A reading of the statute informs that it is inapplicable where a Federal Court must "protect or effectuate its judgments." The clarity of and numerous statements in the District Court's June 9th opinion and order leave (Appendix B) no doubt that:

1) Petitioner was within the class bound by the final judgment and that "registered" voters and "qualified" voters had identical interests. In any event, Rule 60(b) permits correction of inadvertent errors.

2) Petitioner certainly knew of the proceedings and may have actually participated therein. Notices of Appeal were filed by Petitioner prior to Final Judgment.

3) Petitioner was solicited by his political party to continue the litigation.

4) Petitioner's assertion of inadequacy of representation does not even rise to the level of a colorable claim.

5) Petitioner's argument, in light of the facts, was frivolous.

The Court of Appeals affirmed the District Court's actions (Appendix A). Now, on this appeal, Petitioner is raising and arguing comity, federalism and the Anti-Injunction Statute. An examination of the record exposes the speciousness and the lack of substance in these arguments.

A review of the cases cited by Petitioner with reference to 28 U.S.C. 2283, the Anti-Injunction Statute, reveals that they are cases in which State Court jurisdiction was initially invoked and then an injunction subsequently sought in Federal Court in order to stay the State Court proceedings. Those cases are clearly distinguishable from the case at bar, for jurisdiction was here first acquired by the Federal Court.

The application of 28 U.S.C. 2283 is thus clearly restricted to cases where proceedings in a State Court have commenced before the federal adjudication. *American Houses* v. *Schneider,* 211 F.2d 881; *Western Fruit Growers, Inc.* v. *U.S.,* 124 F.2d 381. Petitioner did not file his State Court action until March 30, 1973, more than sixteen

months after jurisdiction was first acquired by the Federal District Court.

The order that is the subject of this petition recites that it was issued to restrain and enjoin class members

> "... from filing any new actions affecting any matters which were, or could have been, raised herein *and otherwise from taking any actions designed to or which will have the effect of interfering with the carrying out of the orders of this Court;...*" (Emphasis added)

In view of the fact that it has been held repeatedly that where a Federal Court first obtains jurisdiction of the subject matter in controversy, it may enjoin parties from proceeding in a subsequently-brought State Court action which would have the effect of defeating or impairing its jurisdiction, or the lawful effect of its orders or decrees there was a proper determination herein by the District Court. *Looney* v. *Eastern Texas R. Co.*, 38 S.Ct. 460 (1918); *Kline* v. *Burke Const. Co.*, 43 S.Ct. 79 (1922).

This basic principle of law was followed in the reapportionment litigation in *Moss* v. *Burkhart*, D.C. Okla. 1963, 220 F. Supp. 149, *Aff'd.* 84 S.Ct. (1907). In the *Moss* case, certain state senators were enjoined from prosecuting in the State Supreme Court an original action involving constitutional issues relating to apportionment of the State Legislature where identical issues were involved in an action brought in Federal Court which first acquired jurisdiction of the subject matter. See also *Skolnick* v. *State Electoral Board of Illinois*, 336 F. Supp. 839 N.D. Ill. 1971.

Throughout these proceedings, one fact comes through loud and clear, i.e. that petitioner has sought to use the Federal Court System as a political forum. This is clearly recognized by the District Court (Appendix B) and illus-

trated by the transcript (pages 100 and 101) of the hearing on May 21, 1973, where Attorney Duffey, one of the attorneys representing Mr. Kerns, made the following statement to the Court:

"Mr. Duffey:

"... But if the Court would entertain a motion to reopen and permit people from the *Republican party* to litigate the validity of the second plan and of the state law issues under the second plan, certainly there can be nothing injurious to anybody to permit that plan to remain in effect under controlled elections in Ohio and permit orderly procedure for litigation of that second plan." (Emphasis added.)

"The Court:

"We have already gone through an orderly procedure. We have already in an orderly fashion, decided the merits of this entire matter which you are attempting to raise, and that is done. . . ."

The District Court wisely and with commendable restraint, drew the following conclusion from these various representations:

Clearly, what we have here is an effort, and a rather shabby one at that, to utilize a solicited plaintiff to reopen a case already litigated, decided, and appealed. Such activity cannot be too strongly condemned. These subsequent proceedings are not a legitimate attempt to vindicate basic rights, as counsel would have us believe, but rather to use the Court as a political forum. (Emphasis added.) (Appendix B.)

This conclusion was endorsed by the appellate judges when they wrote: "... it is manifest that the questions on

which the decision of the court depends are so unsubstantial as not to need further argument. . . ." (Appendix A.)

This effort of respondents to now obtain Supreme Court review of this case on a record so explicitly and incontrovertibly devoid of merit, reason and good faith, should be summarily rejected.

The interests of partisan political parties are not proper matters for a Court to consider when determining the constitutionality of a reapportionment plan. *Reynolds* v. *Sims*, 84 S.Ct. 1362 at 1391. The dangers of opening reapportionment litigation to partisan political interests are quite obvious. For if the Republican Party is permitted to litigate issues without respect to the Constitution, what would stop the Socialist Party, the Socialist Workers Party, the Communist Party, States Rights Party, the American Party, or any other party that may exist, or come into existence, from insisting upon having apportionment plans judicially scrutinized from the vantage point of their particular party interest?

Petitioner had an opportunity during the hearing on the merits to advise counsel for the class if he had any issues or questions to pursue. Petitioner also had an opportunity during the sixty day period allowed by the Court to examine the plan, to raise any questions or issues with counsel for the class or with the Court. However, Petitioner never raised any questions or issues with counsel for the class, or with the Court. He chose instead to file numerous appeals and then, after all appeals were rejected, or voluntarily withdrawing same, he filed an original action in State Court. With this history of action by Petitioner, the District Court was certainly justified in issuing an injunction of June 11, 1973, and the action by the Court of Appeals in dismissing the challenge to the order was not erroneous.

CONCLUSION

For the reasons and law set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDICES

Respondent's Appendix 1

Complaint for Declaratory Judgment and Injunctive Relief and Request for Three Judge Court

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SAMUEL J. JORDON
6147 Mahoning Avenue
Youngstown, Ohio (Austintown) 44515

Plaintiff,

VS.

MAHONING COUNTY BOARD OF ELECTIONS
Realty Building
Youngstown, Ohio 44503

Defendant.

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1. This Court has jurisdiction of the subject matter of this action by reason of the provisions of the United States Constitution, Amendment 14, Section 1, and Amendment 15, and the provisions of 28 U.S.C.A., Section 1343(3) and (4), and 42 U.S.C.A., Section 1983. This Court has jurisdiction to convene a three-judge court by reason of 28 U.S.C.A., Section 2281.

2. Plaintiff, Samuel J. Jordon, is a citizen of the United States and a resident of Austintown Township, Mahoning County, Ohio. Plaintiff is a duly registered voter under the laws of the State of Ohio and is qualified to vote for candidates for member of the Ohio General Assembly. Plaintiff, pursuant to Rule 23 of the Federal Rules of Civil Procedure, brings this action on his own behalf and on behalf of all persons throughout the State of Ohio qualified to vote for candidates for membership in the Ohio General Assembly. There are common questions of law and fact affecting the rights of plaintiff and the rights of other members of his class. The members of the class are so numerous as to make it impracticable to bring them all before the Court. The claims of plaintiff are typical of the claims of the class. Common declaratory and injunctive relief is sought and plaintiff adequately represents the interests of the members of the class.

3. Defendant, Board of Elections of Mahoning County, is a statutory creation of the State of Ohio and is empowered to conduct elections for membership in the Ohio General Assembly in Mahoning County.

4. Defendants, Jack Sulligan, Philip E. Rogers, Nicholas P. Bernard and Elton W. Luckhart, are duly appointed members of said Mahoning County Board of Elections.

5. Defendants, John J. Gilligan, Joseph T. Ferguson, Robert A. Manning, Ted W. Brown and Anthony O. Calabrese, Sr. (herein referred to collectively as "Apportionment Board") are duly elected public officials of the State of Ohio. This action is brought against said defendants in their official capacities and as the persons respon-

sible for the apportionment of the State of Ohio for members of the Ohio General Assembly.

6. Pursuant to Article XI of the Ohio Constitution, defendant, Apportionment Board, met on September 17, 1971, and on September 30, 1971, adopted rules of procedure, and established, in the manner prescribed by Article XI of the Ohio Constitution, the boundaries for each of ninety-nine house of representatives districts and thirty-three senate districts.

7. Pursuant to the requirements of Article XI of the Ohio Constitution, defendant, Apportionment Board, at said meeting established that the whole population of the State of Ohio, as determined by the 1970 federal decennial census, was 10,652,017. Defendant, Apportionment Board, further determined according to Article XI of the Ohio Constitution that the ratio of representation in the house of representatives is 107,596, and that the ratio of representation in the senate is 322,788. The aforesaid ratios of representation are the mean district sizes for the house of representatives and senate respectively.

8. Plaintiff herewith incorporates by reference the description of the apportionment established by defendant Apportionment Board for the Ohio house of representatives which is attached to this Complaint and denominated "Appendix I". Plaintiff further incorporates by reference the description of the apportionment established by defendant, Apportionment Board for the Ohio senate which is attached to this Complaint and denominated "Appendix II".

9. Plaintiff says upon information and belief that the apportionment established by defendant, Apportionment

Board, upon its face creates house of representatives districts ranging from a high of 108,670 persons (House District #72, Appendix I) to a low of 106,571 persons (House District #49, Appendix I). Said house of representatives districts vary from the mean district size by the following percentages of the mean population:

House of Representatives District #72	+ .998%
House of Representatives District #49	— .952%
Total Percentage Variation From Mean	1.950%

10. Plaintiff further says upon information and belief that the apportionment established by defendant, Apportionment Board, upon its face creates senate districts ranging from a high of 325,810 persons (Senate District #3, Appendix II) to a low of 320,933 persons (Senate District #31, Appendix II). Said senate districts vary from the mean district size by the following percentages of the mean population:

Senate District #3	+ .936%
Senate District #31	— .574%
Total Percentage Variation From Mean	1.510%

11. The discrepancies in population between those house of representatives and senate districts with populations in excess of the mean and those house of representatives and senate districts with populations below the mean deprive the plaintiff, and all other electors of the State of Ohio, of the right to cast an equally weighted vote in the primary and general elections for members of the Ohio General Assembly. Said discrepancies in population are neither justifiable nor unavoidable, and result in arbi-

trary, capricious, unreasonable and invidious discrimination among the residents and electors of the State of Ohio. Such discrimination violates the principle of "one-man-one vote," and is contrary to and in violation of the Fourteenth Amendment to the United States Constitution.

12. Article XI, Section 7(A) of the Ohio Constitution states in pertinent part:

> "Every house of representatives district shall be compact and composed of contiguous territory, and the boundary of each district shall be a single non-intersecting continuous line. . . ."

This section requires defendant,Apportionment Board, to establish districts which are compact.

13. The apportionment established by defendant, Apportionment Board, creates house of representatives districts which are not compact. The wild, irregular and grotesque configurations found in said apportionment meet no judicially cognizable standard of compactness.

14. Article XI of the Ohio Constitution sets out certain standards to which defendant, Apportionment Board, must adhere in establishing the boundaries of the house of representatives districts. Said standards, in pertinent part, are as follows:

Section 8:

> "A county having at least one house of representatives ratio of representation shall have as many house of representatives districts wholly within the boundaries of the county as it has whole ratios of representation. Any fraction of the population in excess

of a whole ratio shall be a part of only one adjoining house of representatives district."

Section 10(C):

"Proceeding in succession from the largest to the smallest, each remaining county containing more than one whole ratio of representation shall be divided into house of representatives districts. Any remaining territory within such county containing a fraction of one whole ratio of representation shall be included in one representative district by combining it with adjoining territory outside the county."

15. The apportionment established by defendant, Apportionment Board, violates the aforesaid provisions of Article XI of the Ohio Constitution. For example, the population of Lake County in excess of one whole ratio of population is included in more than one adjoining house of representatives district.

16. Article XI, Section 11, of the Ohio Constitution sets out certain standards to which the defendant, Apportionment Board, must adhere in establishing the boundaries of senate districts. Said section states in pertinent part as follows:

"Senate districts shall be composed of three contiguous house of representatives districts. A county having at least one whole senate ratio of representation shall have as many senate districts wholly within the boundaries of the county as it has whole senate ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining senate district. Counties having less

than one senate ratio of representation, but at least one house of representatives ratio of representation shall be part of only one senate district."

17. The plan of apportionment adopted by defendant, Aportionment Board, violates the aforesaid provision of Article XI of the Ohio Constitution in that certain counties having less than one senate ratio of representation, but at least one house of representatives ratio of representation are part of more than one senate district. Among such counties are Lake, Mahoning, Clark, Butler and Richland.

18. The apportionment established by defendant, Apportionment Board, is contrary to and in violation of numerous other provisions of the Ohio Constitution, thereby depriving plaintiff and all other electors and residents of the State of Ohio of their right to elect members of the General Assembly under a lawful and constitutional apportionment as defined by the Ohio Constitution.

19. The apportionment established by defendant, Apportionment Board, fails to enumerate or include therein numerous political and geographical subdivisions. Among such omitted subdivisions are Zanesville Township or Zanesville City, precinct 36 of Austintown Township of Mahoning County, precinct D of Columbus ward 20, Liberty Township of Van Wert County, Bowling Green Township or Bowling Green City of Wood County, Springfield Township of Muskingum County, precincts F, M, Y, NN, U, L, X, R, and P of Cleveland ward 33 and precincts I, A, T, E, N, D, F, Y, B, G, K, L, Z, M, V, P, Q, W, J, H, C and X of Cleveland ward 6. Plaintiff intends the above listing to

constitute particular examples of omissions, and not as a complete listing of all omitted subdivisions.

20. The failure of defendant, Apportionment Board, to include said subdivisions within any house of representatives district or senate district effectively deprives the residents of those subdivisions of the right to vote for and be represented by members of the Ohio General Assembly. Such failure also deprives all electors of Ohio of their right to be governed by a General Assembly which is representative of the electors.

21. The omission of the above mentioned subdivisions constitutes arbitrary, capricious, unreasonable and invidious discrimination against those electors of Ohio who reside in omitted districts, in violation of both the Equal Protection Clause and the Privileges and Immunities Clause of the Fourteenth Amendment of the United States Constitution, and Article V of the Ohio Constitution.

22. The sole intent of defendant, Apportionment Board, in establishing the apportionment required by Article XI of the Ohio Constitution was to minimize the participation and representation of certain cognizable political, social, racial, economic, and ethnic elements in the Ohio General Assembly. Districts were so constructed as to effectively deny or dilute the voting rights and voting strength of such elements.

23. Determination of legislative districts by factors other than population constitutes invidious discrimination incompatible with the requirements of the Fourteenth and Fifteenth Amendments of the United States Constitution. This action of defendant, Apportionment Board, constitutes

arbitrary and capricious state action, offensive to the Fourteenth and Fifteenth Amendments in its irrational disregard of the standard of apportionment prescribed by the Fourteenth and Fifteenth Amendments and the Ohio Constitution.

24. The election of members for the Ohio General Assembly from districts defined in the apportionment established by defendant, Apportionment Board, will under color of Ohio law irreparably damage and deprive plaintiff and others similarly situated of rights secured by the Constitutions of the United States and of Ohio.

25. The next primary election for the nomination of candidates for member of the Ohio General Assembly is scheduled for May 2, 1972, and by Ohio law candidates for said nomination must file nominating petitions with defendant, Board of Elections, by February 2, 1972. The next general election for members of the Ohio General Assembly is scheduled for November 7, 1972. Unless restrained by this Court, defendants, Ted W. Brown and Board of Elections, will conduct these elections under the apportionment established by defendant, Apportionment Board. Sufficient and ample time exists for defendant, Apportionment Board, to meet and establish an equitable apportionment of the districts of the Ohio General Assembly which will be consistent with the requirements of the United States Constitution and the requirements of the Ohio Constitution.

DEMAND FOR RELIEF

1. WHEREFORE, plaintiff respectfully requests the Court to determine, adjudge, declare and decree under the provi-

sions of Title 28, U.S.C.A., Section 2201, that the apportionment established by defendant, Apportionment Board, is in violation of the Fourteenth and Fifteenth Amendments of the United States Constitution and of Article V and Article XI of the Ohio Constitution, and that said apportionment is, therefore, null and void, invalid, and of no effect.

2. Plaintiff further requests the Court to issue a preliminary injunction enjoining the defendant, Ted W. Brown, chief election officer of the State of Ohio, and defendant, Mahoning County Board of Elections, its members, agents, employees, and successors, from conducting under the apportionment established by defendant, Apportionment Board, the next primary election for the nomination of members of the Ohio General Assembly scheduled for May, 1972, and the general election for members of the Ohio General Assembly scheduled for November, 1972.

3. Plaintiff further requests the Court to issue a preliminary mandatory injunction requiring defendants, John J. Gilligan, Joseph T. Ferguson, Ted W. Brown, Anthony O. Calabrese, Sr. and Robert A. Manning to meet as those persons responsible under Article XI of the Ohio Constitution for the apportionment of Ohio for members of the Ohio General Assembly and to establish for use in the May, 1972, primary election an apportionment of Ohio for members of the Ohio General Assembly which meets the standards and requirements of the United States Constitution and the Constitution of Ohio.

4. Plaintiff further requests this Court to retain jurisdiction over this action until such time as defendant, Apportionment Board, establishes, and submits to this Court

for approval, an apportionment which meets the standards and requirements of the Constitutions of the United States and of Ohio.

5. Plaintiff further requests that the Court award reasonable counsel fees to his attorneys for services rendered and to be rendered in this action, that the Court allow them all out-of-pocket expenses of this action, and that the Court tax the costs of this action to defendant, Apportionment Board.

6. Plaintiff requests that the Court grant such other and further relief as the Court deems proper.

REQUEST FOR THREE-JUDGE COURT

Pursuant to 28 U.S.C.A., Section 2284, plaintiff respectfully requests that a three-judge court be promptly convened to hear and determine this action, and that the Chief Judge of the Sixth Circuit be notified of this request in order that the necessary designation of judges for said Court may be made.

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Respondent's Appendix 2

Order of United States Court of Appeals for the Sixth Circuit, November 9, 1973

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 73-1972

SAMUEL J. JORDON,

Plaintiff-Appellee,

v.

LLOYD GEORGE KERNS,

Appellant,

v.

MAHONING COUNTY BOARD OF ELECTIONS, ET AL.,

Defendants-Appellees.

Before: PECK, MILLER and LIVELY, Circuit Judges.

This cause having come on to be considered on the motion of certain of the defendants-appellees to dismiss the appeal, and the Court being fully advised in the premises having concluded for the reasons set forth in the Memorandum Opinion and Order filed by Chief Judge Frank J. Battisti that it is manifest that the questions on which the decision of the court depends are so unsubstantial as not to need further argument (Rule 8, Rules of the Sixth Circuit), and that therefore the said Motion to Dismiss is well taken,

Order of U. S. Court of Appeals for the Sixth Circuit

IT IS ORDERED that this appeal be and it hereby is dismissed. It is further ORDERED that the motion of the appellant for an expedited appeal be and it hereby is denied as moot.

ENTERED BY ORDER OF THE COURT

/s/ JAMES A. HIGGINS
Clerk

Respondent's Appendix 3

Final Order of March 13, 1972, Adopting Apportionment Plan for Remainder of Decennium

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

No. C 71-1130 Y

SAMUEL J. JORDON, *et al.*,

Plaintiffs,

vs.

MAHONING COUNTY BOARD OF ELECTIONS, *et al.*,

Defendants.

Before CELEBREZZE, Circuit Judge; BATTISTI, Chief Judge; and WALINSKI, District Judge.

Pursuant to the December 22, 1971, Order of this Court, the plaintiffs were granted leave to examine the reapportionment plan and file objections thereto. The plaintiffs have filed their report containing no objections. Therefore, the reapportionment plan is adopted; and, accordingly, there is no compelling reason to retain jurisdiction.

It is so ordered.

ANTHONY J. CELEBREZZE,
Circuit Judge

FRANK J. BATTISTI,
Chief Judge

NICHOLAS J. WALINSKI,
District Judge

Respondent's Appendix 4

Ruling on Application for Three-Judge Court and Standing of Plaintiff, November 30, 1971

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Case No. C 71-1130 Y

SAMUEL J. JORDON,

Plaintiff,

vs.

MAHONING COUNTY BOARD OF ELECTIONS, *et al.,*

Defendants.

The Defendants, John J. Gilligan, Joseph T. Ferguson, Anthony O. Calabrese, Sr. and Robert A. Manning, having questioned the standing of Plaintiff to sue, and the District Judge, considering said question along with the application for appointment of a three Judge Court, and having heard counsel on the issues raised, finds:

1. That the question of the constitutionality of the Ohio Reapportionment Plan is a proper matter for submission to a three Judge Court and the Chief Judge of the United States Court of Appeals for the Sixth Circuit has been requested to designate a panel to consider same.

2. That Plaintiff, a registered voter of the state of Ohio, has standing to sue.

/s/ FRANK J. BATTISTI, Chief Judge,
United States District Court

Respondent's Appendix 5

Class Action Order Finding That Plaintiff Represents All Registered Voters of the State of Ohio as a Class, November 30, 1971

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION
Case No. C 71-1130 Y

SAMUEL J. JORDON,

Plaintiff,

vs.

MAHONING COUNTY BOARD OF ELECTIONS, *et al.,*

Defendants.

At a session of said Court held in the United States Court House in the City of Cleveland on the 22nd day of November, A.D., 1971.

Present, Honorable Frank J. Battisti, Chief Judge, United States District Court.

The Court, having heard counsel for the parties on the question of whether this action can be maintained as a class action, after due deliberation:

The Court finds that this cause of action meets the prerequisite of Rule 23(a) of the Federal Rules of Civil Procedure, and that it comes within the provisions of Rule 23(b)(2) of the Federal Rules of Civil Procedure.

IT IS ORDERED, pursuant to Rule 23(c)(1) that the Plaintiff's action may be maintained and hereby is recognized as a class action, Rule 23(b)(2), on behalf of:

Class Action Order

All registered voters of the state of Ohio.

The Court takes judicial notice of the fact that this lawsuit has received widespread, pervasive publicity through the mass news media, and that the ordinary news coverage in such mass news media of this order will effectively and adequately place all interested members of the class on notice of the pendency of the action, and its nature and purpose:

WHEREFORE, NOTICE IS HEREBY GIVEN that the Court has determined that the Plaintiff in this action represents all registered voters in the state of Ohio and that this action seeks to have declared as unconstitutional the Ohio Legislative Apportionment Plan.

Any member of the class described above who believes that his interest in the action is not or will not be fairly and adequately represented by the party Plaintiff, shall file his appearance in this cause and accompany the same with a statement of reasons for such belief. Such appearance must be filed with the Clerk of Court not later than 9:30 a.m., December 3rd, 1971. In the event appearances or interventions are filed on or before said December 3rd, 1971, the Court will conduct a hearing on same at 10:00 a.m. in the forenoon in its Court Room, United States Court House, Cleveland, Ohio, to consider such appearances and/or interventions and to outline procedures to be followed in these proceedings.

/s/ FRANK J. BATTISTI, Chief Judge
United States District Court

Respondent's Appendix 6

Memorandum Opinion and Order Directing Apportioning Persons to Present Constitutionally Sound Plan by December 21, 1971, Filed December 3, 1971

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Case No. C 71-1130 Y

SAMUEL J. JORDON,

Plaintiff,

vs.

MAHONING COUNTY BOARD OF ELECTIONS, *et al.*,

Defendants.

Before: CELEBREZZE, Circuit Judge; BATTISTI, Chief Judge, and WALINSKI, District Judge.

This action challenges the September 30, 1971, apportionment plan promulgated by the Ohio Apportionment Board, as a denial of equal protection. Specifically challenged under the plan are:

1. The 1.950% total deviation from the mean population for the state House of Representatives districts and the 1.510% total deviation from the mean population for state senate districts;

2. The plan's non-compliance with the Ohio Constitution Article XI, §§ 8, 10(c) and 11, providing that fractional portions of a house or senate district within one county

must be part of only one district in an adjoining county; and

3. The plan's failure to include, *inter alia,* Zanesville City, Bowling Green City, and the plaintiff's ward in Youngstown in any house or senate districts.

On the face of his complaint, plaintiff raises a claim which clearly indicates a denial of equal protection over which this three-judge district court has jurisdiction. See *Baker* v. *Carr,* 369 U.S. 186, 195-204 (1962). The parties have stipulated and conceded that the plan in its present form is unconstitutional on its face and they have also stipulated as to the truth of the above allegations. A copy of this stipulation is attached to and incorporated into this Opinion.

Although the Ohio Constitution, Article XI, § 13 provides that . . . "the Supreme Court of Ohio shall have exclusive, original jurisdiction in all cases arising under this Article," the Supremacy Clause of Article VI of the United States Constitution prevents a state constitution from limiting the jurisdiction of federal courts.

Subsequent to the filing of the instant case, a similar suit was filed in the Ohio Supreme Court, *Norris* v. *Gilligan, et al.,* No. 71-748.

Being aware that nominating petitions must be filed in less than two months, this Court concludes that abstention doctrine is inappropriate here. *Cf. Railroad Commission of Texas* v. *Pullman Co.,* 312 U.S. 496 (1941). It is clear that the apportionment plan is unconstitutional on its face and no conceivable ruling by the Ohio Supreme Court could alter this situation. *Turner* v. *City of Memphis,* 369 U.S. 350 (1962).

Numerous cases have consistently recognized the propriety and advisability of allowing the state legislature

or an Apportionment Board an opportunity to reapportion its state within guidelines propounded by the federal courts. See, e.g. *Nolan* v. *Rhodes,* 251 F. Supp. 584, 585-86, (S.D. Ohio, 1965); *Wells* v. *Rockefeller,* 281 F. Supp. 821, 822-23 (S.D. N.Y. 1968), *rev'd on other grounds,* 394 U.S. 542 (1968). In the instant case the Apportionment Board is the state body responsible for reapportionment.

It is clear that the plan as presently constituted is unconstitutional in that if the plan were enacted in its present form it would be violative of the one man, one vote requirement; *Baker* v. *Carr,* 369 U.S. 186 (1962); *Reynolds* v. *Sims,* 377 U.S. 533 (1964); *Wesberry* v. *Sanders,* 374 U.S. 802 (1964), because of the omission of certain cities and wards in Ohio. This Court makes no finding on the other issues raised in the complaint. However, on resubmission population variances must be justifiable and unavoidable. Therefore, this Court directs that the plan be resubmitted to the Apportionment Board and that they present a constitutionally sound plan to this panel no later than December 21, 1971. This Court shall retain jurisdiction until such time as a proper reapportionment plan is approved by it.

Since this case is a properly constituted class action in which no objection has been filed, all members of the class are prohibited from litigating any issues raised here in any other court during the pendency of this action.

It is so ordered.

/s/ Anthony J. Celebrezze
Circuit Judge

/s/ Frank J. Battisti
Chief Judge

/s/ Nicholas J. Walinski
District Judge

Respondent's Appendix 7

Memorandum Opinion and Order, December 22, 1971

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

No. C 71-1130 Y

SAMUEL J. JORDON, *et al.*,

Plaintiffs,

v.

MAHONING COUNTY BOARD OF ELECTIONS, *et al.*,

Defendants.

Before: CELEBREZZE, Circuit Judge; BATTISTI, District Chief Judge; and WALINSKI, District Judge.

This Court in its order of December 3, 1971, found that the apportionment plan adopted by the Board of Apportionment was unconstitutional on its face. This Court thereupon directed that the plan be resubmitted to the Board of Apportionment for the purpose of preparing and submitting a constitutionally sound plan to the Court by December 21, 1971. On December 22, 1971, this cause came on for hearing. A plan was submitted and evidence received.

On consideration of the evidence thus far in the case, the Court concludes that the Board of Apportionment, using the best available 1970 official census or census related data, has made a good faith effort to apply the one-man, one-vote doctrine in devising a plan for redis-

tricting the General Assembly of the State of Ohio, and that the plan as presented to the Court on December 21, 1971, insofar as practicable, meets the one-man, one-vote standard required by the Constitution of the United States.

Therefore, it is concluded that the plan as presented to this Court meets the one-man, one-vote standard required by the Constitution of the United States.

In light of plaintiffs' motion seeking a reasonable time in which to further examine the entire plan submitted to plaintiffs and this Court this day, leave is granted to examine same, to file objections thereto, and to be prepared to proceed not later than sixty days from the date of entry of this order.

Since time is of the essence in that the filing date for the primary election is February 2, 1972, and the Constitution of the State of Ohio requires that candidates be afforded a thirty-day period in which to change their residences prior to the filing date, the plan is adopted for the 1972 election of the Ohio General Assembly. See *Wells* v. *Rockefeller*, 394 US 542, 547 (1969).

This Court retains jurisdiction over this matter.

It is so ordered.

/s/ Anthony J. Celebrezze
Circuit Judge

/s/ Frank J. Battisti
Chief Judge

/s/ Nicholas J. Walinski
District Judge

No. 73-920

JAN 28 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

LLOYD GEORGE KERNS, *Petitioner*

v.

SAMUEL J. JORDON, MAHONING COUNTY BOARD OF ELECTIONS, JOHN J. GILLIGAN, Governor of the State of Ohio, JOSEPH T. FERGUSON, Auditor of the State of Ohio, TED W. BROWN, Secretary of State of the State of Ohio, ANTHONY O. CALABRESE, SR., Member, Ohio Senate, and ROBERT A. MANNING, Member, Ohio House of Representatives, *Respondents.*

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The principal theme which runs throughout the two briefs submitted by Respondents is that Petitioner's action in the Ohio Supreme Court, which was enjoined by Judge Battisti, was an attempt to relitigate the issues decided by the three judge district court in *Jordon* v. *Mahoning County Board of Elections.* Indeed, this bald assertion appears so many times in the course of both briefs, it is as if Respondents believe they can make it so by simply stating it enough times. The record in this case is, however, absolutely clear on the two simple propositions which are central to Petitioner's argument: (1) The three judge district court in the *Jordon case* decided only the federal constitu-

tional issue raised in the complaint (the one man—one vote issue); and (2) Petitioner's action in the Ohio Supreme Court raised only the state constitutional infirmities of the 1971 reapportionment plan. Thus, this case involves a federal injunction against a state court proceeding in which only previously undecided state issues were involved. As such, the injunction is in brazen defiance of the Anti-Injunction Statute (28 U.S.C. § 2283).

The second proposition that Respondents offer is that Petitioner is politically motivated. We are confident that such a proposition does not lie easily in the mouths of Respondents. This Court has recently recognized that politics and legislative reapportionment are inextricably intertwined. *Gaffney* v. *Cummings,* 412 U.S. 735 (1973). In this case, Petitioner is a Republican legislator, four of the six Respondents are Democrat officeholders, and to date Respondents have successfully prevented the state constitutional deficiencies of the 1971 legislative reapportionment plan from being litigated in any court, including the three judge district court that heard the *Jordan* case. But what petitioner seeks is only the opportunity to have these infirmities reviewed by the Ohio Supreme Court, the court which has exclusive, original jurisdiction of such matters under the Ohio Constitution. As such, this case transcends Ohio politics; Petitioner's claims are legal, not political.

Two decisions cited by Respondents require comment. *Skolnick* v. *State Electoral Board of Illinois,* 336 F. Supp. 839 (N.D. Ill. 1971), is clearly inapposite to this case as it involved federal congressional redistricting. Moreover, the suit in the Illinois Supreme Court which was ordered terminated in that case did

not seek to vindicate rights under the state constitution, as did Petitioner's action in the Ohio Supreme Court, but rather sought to set aside a prior order of a federal district court. Inasmuch as Petitioner seeks only to raise the state constitutional issues which were not passed on by the three judge district court, no attack, direct or collateral, on the *Jordon* case judgment resulted from Petitioner's action in the Ohio Supreme Court.

Moss v. *Burkhart,* 220 F. Supp. 149 (W.D. Okla. 1963), involved the reapportionment of the Oklahoma legislature by a three judge district court after the legislature itself had failed to make the required reapportionment. Certain parties who had successfully intervened in the three judge district court proceeding filed an original action in the Oklahoma Supreme Court alleging substantially the same claims that were before the three judge district court. Under those circumstances, the three judge court enjoined the continued prosecution of the claims in the state supreme court that duplicated claims over which the three judge court had obtained jurisdiction (*see* 220 F. Supp. at 162). Obviously, the *Moss* case is not authority for the district court's injunction in this case.

Finally, Respondents make several specious arguments, each of which requires a brief response. For example, the brief filed on behalf of the apportioning persons asserts that the injunction of which Petitioner complains was not sought against the Ohio Supreme Court but rather against the litigants in that court. The prohibitions of the Anti-Injunction Statute, however, cannot be avoided by addressing the injunction to the parties rather than the state court. *Atlantic Coast Line Railroad Co.* v. *Brotherhood of*

Locomotive Engineers, 398 U.S. 281, 287 (1970); *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.,* 309 U.S. 4, 9 (1940); *Hill* v. *Martin,* 296 U.S. 393, 403 (1935). By the same token, the attempted grafting of an additional exception onto the Anti-Injunction Statute that would ban its application in cases where federal jurisdiction is first invoked is contrary to settled law. *Atlantic Coast Line Railroad Co.* v. *Brotherhood of Locomotive Engineers, supra.*

A similarly misleading argument is that Petitioner, as a member of the original class in the *Jordon* case, is bound by the actions of the class representative in that case and should have raised objections to the three-judge court plan prior to its adoption. But, as we previously made clear (Petn. 8), class members were not permitted to intervene or otherwise to be heard prior to adoption of the plan. Moreover, the original class in the *Jordan* litigation was defined by the court as "all registered voters in Ohio." Petitioner is and was not a "registered voter" since he resides and votes in an area of Ohio where registration is not required. Indeed, it was not until June 11, 1973, some fifteen months after the three judge district court had relinquished jurisdiction of the *Jordon* case, and two months after Judge Battisti's restraining order, that Judge Battisti by a *nunc pro tunc* order expanded the *Jordon* class to include Petitioner and other non-registered voters.[1]

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[1]Respondents also make the curious argument—apparently in opposition to the Petition for Certiorari—that "the identical questions being raised by Petitioner in his Petition for Certiorari were before the United States Court of Appeals for the Sixth Circuit". Obviously, the same basic issue was before the Sixth Circuit as is raised in the Petition for Certiorari. Had that court ruled on the merits of Petitioner's argument, the Petition for Certiorari might not have been filed.

CONCLUSION

The briefs submitted on behalf of Respondents contain neither analysis nor authority which refutes the substantial claims made by Petitioner. The Petition for Certiorari should be granted.

Respectfully submitted,

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